Supreme Court of the United States

OCTOBER TERM, 1968

No. 463

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

WYMAN-GORDON COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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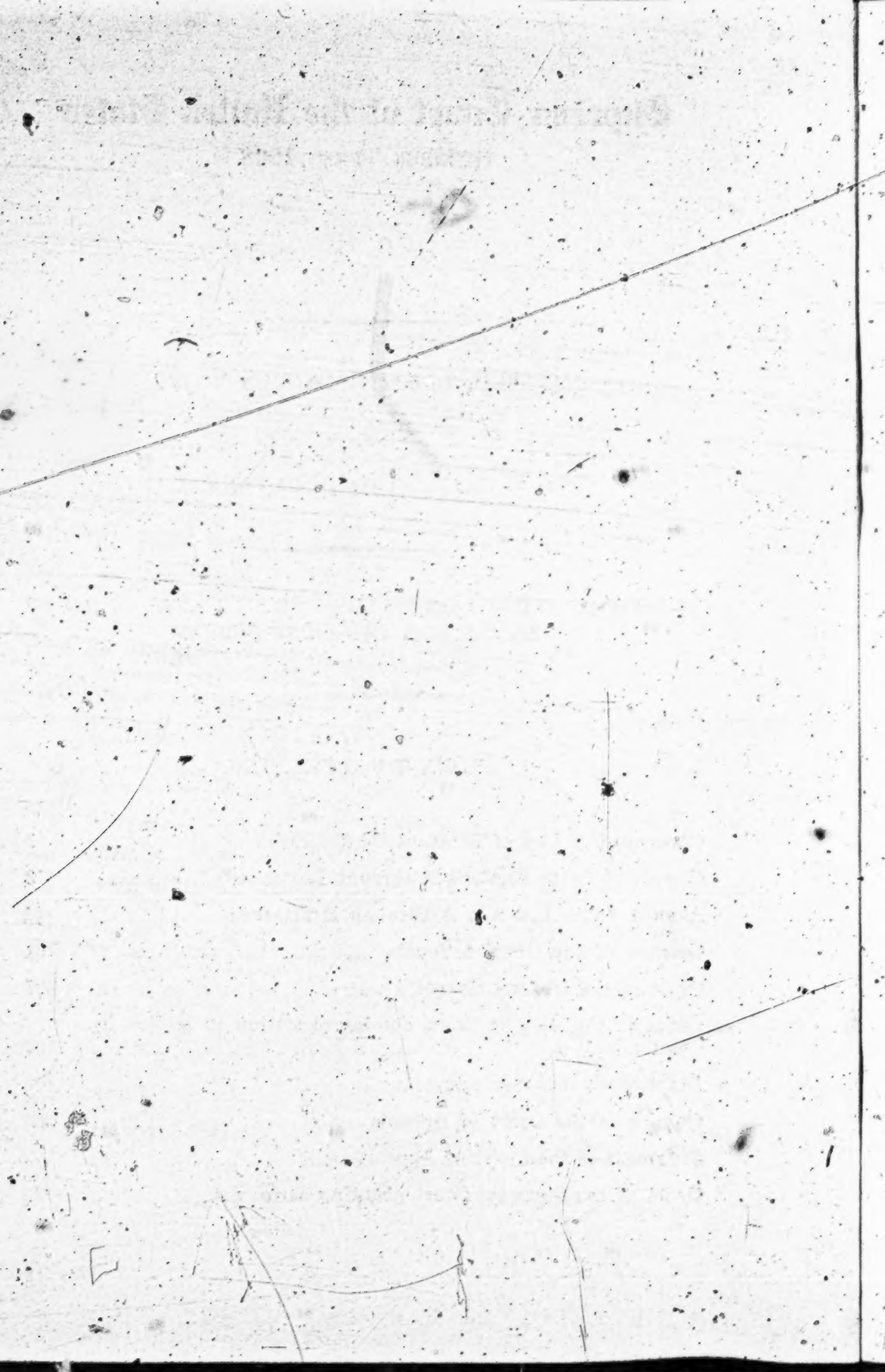

SUPREME COURT OF THE UNITED STATES

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No. 463

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

WYMAN-GORDON COMPANY

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

7.12.66	Representation petition filed.
9.16.66	Regional Director's decision and direction of election issued.
10.19.66	Regional Director's supplemental decision issued setting aside election and directing second election.
10.26.66	Employer's request for review filed.
11.16.66	Board's order denying employer's request for review of Regional Director's supplemental decision.
12.27.66	Subpena duces tecum issued.
12.30.66	Employer's motion to revoke subpena filed.
1.10.67	Board's order denying employer's motion to revoke subpena issued.
3.27.67	Complaint filed.
4.18.67	Answer filed.
6.30.67	Garrity, J. Opinion issued.
7.19.67	Garrity, J. order dated July 17, 1967 entered. ". . . Defs to comply with pltf's subpena, etc. . . ."

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES (Continued)

7.25.67	Defendant's motion for stay of execution pending appeal, filed.
7.26.67	Plaintiff's Assent to Defendant's motion to stay, filed on copy of motion.
7.26.67	Garrity, J. Order staying execution on motion by defendant, entered.
7.28.67	Defendant's notice of appeal, filed.
6.12.68	Opinion of U. S. Court of Appeals for the First Circuit, issued.
6.12.68	Judgment of U. S. Court of Appeals for the First Circuit, entered.
11.12.68	Order granting certiorari, issued.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 67-260 G.

NATIONAL LABOR RELATIONS BOARD, *Plaintiff*,

v.

WYMAN-GORDON COMPANY and JAMES W. STODDARD as President of Wyman-Gordon Company, *Defendants*.

COMPLAINT.

[Filed March 23, 1967.]

COUNT I

Plaintiff for a first count alleges:

1. Plaintiff is an administrative agency created by the National Labor Relations Act, referred to hereafter as "the Act" (29 U.S.C., Sec. 151, *et seq.*), and is empowered and directed to administer the provisions of the Act, including the investigation of questions of employee representation under Section 9 (29 U.S.C., Sec. 159).

2. Defendant James W. Stoddard is the president of Wyman-Gordon Company. Defendant Wyman-Gordon Company is an employer engaged in the manufacture and sale of products for interstate commerce within the meaning of Section 2(6) and (7) of the Act (29 U.S.C., Sec. 152(2) and (7)).

3. Jurisdiction is conferred on this Court by Section 11(2) of the Act (29 U.S.C., Sec. 161(2)), giving the District Courts jurisdiction to issue orders, upon application of the Board, to enforce subpenas issued by the Board.

4. The defendants' plants involved in this judicial proceeding are located at Worcester, North Grafton and Millbury, Massachusetts, within this judicial district.

5. On July 12, 1966, a labor organization (International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO) filed a petition with the Board's First Region at Boston, Massachusetts asserting its claim to represent the Company's production and maintenance employees, and seeking a representation election to establish its majority support. A copy of the petition is attached hereto as Exhibit A.

6. The proceeding instituted by the petition is known on the records of the Board as Case No. 1-RC-9073.

7. Another labor organization (United Steelworkers of America, AFL-CIO) intervened in the representation proceeding to compete with the petitioning union for the employees' support.

8. On September 6, 1966, the Board's Regional Director for the First Region issued a Decision and Direction of Election in the proceeding, pursuant to Section 9(c)(1) of the Act (29 U.S.C., Sec. 159 (c)(1)). A copy of the Decision and Direction of Election is attached hereto as Exhibit B.

9. In his Decision and Direction of Election, the Regional Director directed that an election be held in a unit of approximately 1,750 production and maintenance employees at the Company's Worcester, North Grafton and Millbury, Massachusetts, plants (Exhibit B).

10. The Regional Director further directed the defendant Company (Exhibit B, n. 3) to furnish an election eligibility list containing the names and addresses of all the employees eligible to vote, in accordance with the election rule announced by the Board on February 4, 1966, in its decision in Excelsior Underwear, Inc., et al., 156 NLRB No. 111. A copy of the Board's decisions in the *Excelsior* case is attached hereto as Exhibit C.

11. Under the Board's *Excelsior* rule an employer is required to file with the Board's Regional Director, in the Region where the representation proceeding is pending, a list of the names and addresses of all employees eligible to vote in the representation election within 7 days after the issuance of a Decision and Direction of Election or after the close of the determinative payroll period for eligibility purposes, whichever is later (Exhibit C, p. 5).

12. The *Excelsior* rule further provides that the Regional Director is then to make the list of employee names and addresses available to all parties to the representation proceeding in order to promote the communication of election issues to the employees and to aid in challenging the ballots of employees believed to be ineligible to vote (Exhibit C, pp. 6-10).

13. On September 13, 1966, the Company notified the Regional Director that it would not furnish the eligibility list required by the election rule promulgated in *Excelsior*.

14. On September 29, 1966, an election was conducted in which 226 employees cast valid ballots for the petitioning union (Boilermakers), 555 cast valid ballots for the intervening union (Steelworkers) and 903 employees voted against representation by either union. The Board, however sustained the intervening union's objection to conduct affecting the results of the election based on the Company's failure to furnish the *Excelsior* list set the election aside, and directed a second election. Copies of the Regional Director's report on the election and the Board's order affirming the report are attached hereto as Exhibits D and E.

15. On December 2, 1966, the Regional Director notified the Company that the second election was to be conducted on December 29, 1966, and requested that an election eligibility list of employee names and addresses be filed not later than December 9, 1966, as required by the Board's order and the *Excelsior* rule. A copy of the Regional Director's notice is attached hereto as Exhibit F.

16. The Company again failed to furnish the election eligibility list.

17. Thereafter the unions notified the Regional Director that they do not want to proceed to an election until the Company furnishes the required eligibility list in compliance with the Board's *Excelsior* rule. Accordingly the second election was postponed.

18. The Regional Director caused a subpena *duces tecum* to be issued on December 27, 1966, pursuant to Section 11(1) of the Act (29 U.S.C., Sec. 161(1)), directing defendant James W. Stoddard, president of the Company to produce and make available to the Board's Regional

Office the Company's personnel and payroll records, or an eligibility list in lieu thereof, setting forth the names and addresses of all employees eligible to vote in the election. A copy of the subpena is attached hereto as Exhibit G.

19. The subpena was served upon defendant James W. Stoddard by certified mail on December 28, 1966. (Exhibit G, p. 2).

20. On December 30, 1966, the Company filed a motion to quash the subpena which was denied by the Board by formal telegraphic order issued on January 10, 1967. Copies of the motion to quash and of the order denying the motion are attached hereto as Exhibits H and I.

21. Nonetheless, defendant James W. Stoddard as president of the Company failed and refused and continues to fail and refuse to produce the records and documents called for by the subpena.

22. Defendant Stoddard's refusal to comply with the subpena constitutes contumacious conduct within the meaning of Section 11(2) of the Act (29 U.S.C., Sec. 161(2)).

COUNT II

In the alternative, and for a second count, plaintiff alleges:

1. Plaintiff now pleads as part of this count, and as if fully set out here, paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 of Count I.

2. Jurisdiction is conferred on this Court by 28 U.S.C., Sec. 1337, giving the District Courts original jurisdiction "of all suits and proceedings under any law regulating commerce," without regard to citizenship of the parties or the sum or value in controversy, and by Section 9(c) of the Act (29 U.S.C., Sec. 159(c)).

3. Section 9(c) of the Act authorizes the Board, in furtherance of the broad Congressional purpose of promoting the free flow of commerce, to conduct an investigation upon the filing of a valid representation petition and, if the Board finds that a question of representation exists, to direct an election by secret ballot and certify the results.

4. The Board was acting within its statutory authority in establishing the election rule announced in its *Excelsior* decision.

5. The Company's refusal to comply with the Board's election rule has impeded and continues to impede the Board in resolving the question of representation before it in this case, and has prevented and continues to prevent the Board from conducting a fair and free election in accordance with the policy of the Act set forth in Section 1 and the Board's functions and duties specified in Section 9(c) (29 U.S.C., Secs. 151 and 159(c)).

Wherefore, plaintiff, the National Labor Relations Board, respectfully prays:

(a) That an order to show cause issue forthwith directing defendants to appear before this Court on a day certain to be fixed in said order, and to show cause, if any, why an order should not issue directing defendant James W. Stoddard to comply with the subpena, or, in the alternative, directing the defendant Company to comply with the valid election rule announced by the Board in its *Excelsior* decision;

(b) That upon the return of said order to show cause, an order issue enforcing the subpena or directing the defendant Company to file with the Regional Director a list of the names and addresses of all employees eligible to vote in the election directed by the Board in Case No. 1-RC-9073.

(c) That plaintiff, the National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated this 23d day of March, 1967.

ROBERT E. GREENE
Regional Attorney
National Labor Relations Board
Region 1

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

CASE NO 1-RC-9073

DATE FILED July 12, 1966

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition *(If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)*

(Check one)

X ☐ RC-CERTIFICATION OF REPRESENTATIVES—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.

☐ RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.

☐ RD-DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

☐ UD-WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

☐ UC-UNIT CLARIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees: *(Check one)* ☐ In unit not previously certified ☐ In unit previously certified in Case No. _____

☐ AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. _____

Attach statement describing the specific amendment sought.

2. NAME OF EMPLOYER: Uhman-Gordon Company

EMPLOYER REPRESENTATIVE TO CONTACT: Robert W. Stoddard, Pres.

PHONE NO:

3. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED *(Street and number, city, State, and ZIP Code)*: 105 Madison Street, Worcester, Massachusetts

4a. TYPE OF ESTABLISHMENT *(Factory, mine, wholesaler, etc.)*: Factories

4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE: Metal forgings, etc.

5. Unit Involved *(In UC petition, describe PRESENT bargaining unit and attach description of proposed clarification.)*

Included: All production and maintenance employees including power plant, leaders, hourly rated laboratory employees and model makers employed by the Employer at its Worcester, Mass. and North Grafton, Mass. plants who were employed during the payroll period for the week ending June 12, 1965.

Excluded: Office clerical employees, plant clerical employees, guards and watchmen, salaried laboratory and engineering employees, time-keepers, time study employees, hourly paid engineers, cafeteria employees, professional employees, dispatchers, assistant foremen, working foremen and all supervisors as defined in the Act.

6a. NUMBER OF EMPLOYEES IN UNIT: PRESENT (approx.) 1600

PROPOSED (BY UC/AC)

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?* ☐ YES ☐ NO

*Not applicable in R.M. UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. ☐ Request for recognition as Bargaining Representative was made on _____ *(Month, day, year)* and Employer declined recognition on or about _____ *(Month, day, year)* *(If no reply received, so state)*

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent *(If there is none, so state)*

NAME: none

AFFILIATION:

ADDRESS:

DATE OF RECOGNITION OR CERTIFICATION:

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY *(Show month, day, and year)*:

10. IF YOU HAVE CHECKED BOX UD IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP *(Month, day, and year)*:

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES _____ NO X

11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF _____ *(Insert name)* A LABOR ORGANIZATION, OF _____ *(Insert address)* SINCE _____ *(Month, day, year)*

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c), WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (IF NONE, SO STATE.)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM *(Required only if Petition is filed by Employer)*
none			

☐ RD-DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

☐ UD-WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

☐ UC-UNIT CLARIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees: *(Check one)* ☐ In unit not previously certified ☐ In unit previously certified in Case No. _____

☐ AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. _____

Attach statement describing the specific amendment sought.

2. NAME OF EMPLOYER	EMPLOYER REPRESENTATIVE TO CONTACT	PHONE NO
Unsan-Gordon Company	Robert W. Stoddard, Pres.	

3. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED *(Street and number, city, State, and ZIP Code)*

105 Malicon Street, Worcester, Massachusetts

4a. TYPE OF ESTABLISHMENT *(Factory, mine, wholesaler, etc.)*	4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE
Factories	Metal forgings, etc.

5. Unit Involved *(In UC petition, describe PRESENT bargaining unit and attach description of proposed clarification.)*

Included All production and maintenance employees including power plant, leaders, hourly rated laboratory employees and model makers employed by the Employer at its Worcester, Mass. and North Grafton, Mass. plants who were employed during the payroll period for the week ending June 12, 1965.

Excluded Office clerical employees, plant clerical employees, guards and watchmen, salaried laboratory and engineering employees, time-keepers, time study employees, hourly paid engineers, cafeteria employees, professional employees, dispatchers, assistant foremen, working foremen and all supervisors as defined in the Act.

6a. NUMBER OF EMPLOYEES IN UNIT:
(approx.)
PRESENT 1600
PROPOSED (BY UC/AC)

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?
☐ YES ☐ NO
*Not applicable in R.M. UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. ☐ Request for recognition as Bargaining Representative was made on _____ *(Month, day, year)* and Employer declined recognition on or about _____ *(Month, day, year)* *(If no reply received, so state)*

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent *(If there is none, so state)*

NAME	AFFILIATION
none	
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY *(Show month, day, and year)*	10. IF YOU HAVE CHECKED BOX UD IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP *(Month, day, and year)*

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES ..... NO X	11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF _____ *(Insert name)* A LABOR ORGANIZATION, OF _____ *(Insert address)* SINCE _____ *(Month, day, year)*

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c), WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (IF NONE, SO STATE.)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM *(Required only if Petition is filed by Employer)*
none			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO
(Petitioner and affiliation, if any)

s/s/ Vincent J. Curran ..... Int'l. Representative
(Signature of representative or person filing petition) *(Title, if any)*

Address 1 Cumwood Street, Worcester, Massachusetts ..... *(Street and number, city, State, and ZIP Code)* *(Telephone number)*

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 100)

GPO 834-

cc: Russell K. Berg, 570 New Brotherhood Building, Kansas City, Kansas 66101
Charles F. Moran, I. V. P., 25 West 45th Street, Rm. 1203, New York, N. Y.

EXHIBIT A.

8

EXHIBIT B.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WYMAN-GORDON COMPANY

Employer

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

Petitioner

Case No. 1-RC-9073

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization(s) involved claim(s) to represent certain employees of the Employer.[1]

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

[1] United Steelworkers of America, AFL-CIO was permitted to interevene at the hearing on the basis of a showing of interest.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[2]

All production and maintenance employees including power plant employees, cafeteria employees, leaders, hourly-rated laboratory employees, and model makers, employed by the Employer at its Worcester, North Grafton, and Millbury, Massachusetts plants, but excluding office clerical employees, plant clerical employees, salaried laboratory and all engineering employees, time keepers, time study employees, professional employees, guards and watchmen, dispatchers, assistant foremen, working foremen, and all supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated

[2] The unit, as amended at the hearing, is in accord with the stipulation of the parties. The Employer is engaged in the manufacture, sale, and distribution of metal forgings and related products at its Worcester, North Grafton, and Millbury, Massachusetts plants where it employs 17,050 persons in the unit found appropriate herein.

before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[3] Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO; or by United Steelworkers of America, AFL-CIO; or by Neither

/s/ ALBERT J. HOBAN
Regional Director, Region 1

Dated September 6, 1966 at Boston, Massachusetts

[3] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Massachusetts 02203, on or before Sept. 13, 1966. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB No. 111.

EXHIBIT C.

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156 NLRB No. 111

D-8291
Saluda, S. C.
and Long Beach, Calif.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCELSIOR UNDERWEAR INC. and SALUDA KNITTING INC.
Employer [1]

and

Case No. 11-RC-1876

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO
Petitioner

K. L. KELLOGG & SONS Employer [2]

and

Case No. 21-RC-8955

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 3, AFL-CIO, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, AFL-CIO
Joint Petitioners

DECISIONS AND CERTIFICATIONS OF RESULTS OF ELECTIONS

In the *Excelsior* case, pursuant to a Stipulation for Certification upon Consent Election, an election by secret ballot was conducted by the Regional Director for Region 11 on December 6, 1963, among the employees in the unit

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[1] Referred to herein as the *Excelsior* case.

[2] Referred to herein as the *Kellogg* case.

described below. After the election, the parties were furnished with a tally of ballots which showed that of approximately 247 eligible voters, 246 cast ballots, of which 35 were for, and 206 against, the Petitioner, and 5 challenged. The challenges were insufficient in number to affect the results of the election. The Petitioner filed timely objections to conduct affecting the results.

The objections, as summarized by the Regional Director, related to the following:

(1) The Employer's conduct on November 29 in mailing to all employees an 8-page letter allegedly containing material misstatements as to Union dues and initiation fees, as well as provisions of the National Labor Relations Act, threats of plant closings, strikes and violence, and a predetermined position of refusing to bargain in the event the Union were to be selected as bargaining representative.

(2) The Employer's conduct in refusing to supply the Union with a list of employees and their addresses for the purpose of allowing the Union to answer the letter referred to in Objection No. 1.

(3) The Employer's conduct on or about December 4, in posting a notice at its plants materially misrepresenting Union officials' salaries.

(4) The Employer's conduct on December 5, in giving a speech to employees on Company time containing promises of benefit if the employees did not select the Union as their bargaining representative.

(5) The conduct of certain townspeople of Saluda, South Carolina, in speaking to groups of employees on December 3 and 4, and informing them that other companies interested in relocating in Saluda, South Carolina, would not do so if the Union were selected as bargaining representative. Said townspeople allegedly also stated that Union representatives were Communistic and did not believe in God.

After investigation, the Regional Director, on January 10, 1964, issued and served upon the parties his Report

and Recommendation on Objections, in which he recommended that the objections be overruled and that a certification of election results be issued. Petitioner filed timely exceptions to the Regional Director's report.

In the *Kellogg* case, pursuant to a Stipulation for Certification upon Consent Election, a mail election by secret ballot was conducted by the Regional Director for Region 21 between May 15, 1964, and May 28, 1964, among the employees in the unit described below. After the election, the parties were furnished with a tally of ballots which showed that of approximately 81 eligible voters, 30 cast votes, of which 9 were for, and 21 against, the Joint-Petitioners. The Joint Petitioners filed timely objections to conduct affecting the results of the election.

Objection No. 1 alleged that the Employer, on or about May 5, 1964, and May 13, 1964, sent to each employee letters containing certain false and coercive material. Objection No. 2 complained of the Employer's denial of the Joint-Petitioners' request for a list of employees' names and addresses so that it would have an opportunity to mail campaign material to those employees.

After investigation, the Regional Director, on July 16, 1964, issued and served upon the parties his Report and Recommendation on Objections, in which he recommended that Objection No. 1 be sustained, Objection No. 2 be overruled, and the election be set aside and a new election directed. The Joint-Petitioners filed timely exceptions to the Regional Director's recommendation that Objection No. 2 be overruled.[3]

On April 2, 1965, the National Labor Relations Board, having determined that the Employers' denial of the Petitioners' request for the names and addresses of employees eligible to vote in the elections in these two cases presented a question of substantial importance in the administration of the National Labor Relations Act, as amended, ordered that the two cases be consolidated, and that oral argument be heard before the Board on May 20, 1965. The parties were given permission to file further briefs

---

[3] The Employer filed timely exceptions to the Regional Director's recommendation with respect to Objection No. 1.

and directed to focus their attention, in briefs and argument, on the following questions:

I. Can a fair and free election be held when the union involved lacks the names and addresses of employees eligible to vote in that election, and the employer refuses to accede to the union's request therefor?

II. If such information should be made available, should the requirement be limited to situations in which the employer has utilized his knowledge of these names and addresses to mail antiunion letters or literature to employees' homes?

III. If some requirement that the employer make addresses available is to be imposed, how should this be implemented? For example, should such names and addresses be furnished to a mailing service with instructions to mail, at the union's expense, such materials as the union may furnish? Or, should the union be entitled to have the names and addresses?

The Board also invited certain interested parties to file briefs *amicus curiae* and to participate in oral argument. This invitation was accepted by: the Chamber of Commerce of the United States; American Federation of Labor-Congress of Industrial Organizations; International Union of Electrical, Radio and Machine Workers, AFL-CIO; and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO. The National Association of Manufacturers, Retail Clerks International Association, AFL-CIO, and Textile Workers Union of America, AFL-CIO, filed briefs but did not participate in the argument. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America participated in the argument but did not file a brief.

Upon the entire record in each of these cases, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner (Joint-Petitioners in *Kellogg*) is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4(a) In *Excelsior* the parties stipulated, and we find, that all production and maintenance employees, plant clerical employees, and janitors at both the Employer's plants in Saluda, South Carolina, excluding all office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(b) In *Kellogg* the parties stipulated, and we find, that all drillers, derrickmen, rotary helpers, yardmen, mechanics, and welders, excluding all office clerical employees, professional employees, truckdrivers, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

5. Exceptions 1, 3, 4, and 5 in *Excelsior* are without merit and hereby rejected.

6. Objection No. 2 in each of these cases poses the question whether an employer's refusal to provide a union with the names and addresses of employees eligible to vote in a representation election should be grounds on which to set that election aside. The Board has not in the past set elections aside on this ground. For, while the Board has required that an employer, shortly before an election, make available for inspection by the parties and the Regional Director a list of employees claimed by him to be eligible to vote in that election, there has been no requirement that this list contain addresses in addition to names. The rules governing representation elections are not, however, "fixed and immutable. They have been changed and refined, generally in the direction of higher standards."[4]

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[4] *Sewell Manufacturing Company*, 138 NLRB 66, 70. And see, e.g., *Peerless Plywood Company*, 107 NLRB 427; *Gummed Products Co.*, 112 NLRB 1092; *Hollywood Ceramics Co., Inc.*, 140 NLRB 221; *Dal-Tex Optical Co.*, 137 NLRB 1782, at 1786-7.

We are persuaded, for the reasons set out below, that higher standards of disclosure than we have heretofore imposed are necessary, and that prompt disclosure of the information here sought by the Petitioners should be required in all representation elections. Accordingly, we now establish a requirement that will be applied in all election cases. That is, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties pursuant to Section 102.62 of the National Labor Relations Board Rules and Regulations or after the Regional Director or the Board has directed an election pursuant to Section 102.67, 102.69, or Section 102.85 thereof, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case.[5] Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.[6]

The considerations that impel us to adopt the foregoing rule are these: "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone."[6] In discharging that trust, we

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[5] In the event that the payroll period for eligibility purposes is subsequent to the direction of election or consent-election agreement, the eligibility list shall be filed within 7 days after the close of the determinative payroll period for eligibility purposes. In order to be timely, the eligibility list must be *received* by the Regional Director within the period required. No extension of time shall be granted by the Regional Director except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

However, the rule we have here announced is to be applied prospectively only. It will not apply in the instant cases but only in those elections that are directed, or consented to, subsequent to 30 days from the date of this Decision. We impose this brief period of delay to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated.

[6] *N.L.R.B.* v. *Waterman S. S. Corp.*, 309 U.S. 206, 226; see, also, *N.L.R.B.* v. *Shirlington Supermarkets*, 224 F.2d 649, 651 (C.A. 4).

regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice.[7] Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available.[8] In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed.

As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises,[9] has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters.[10] In other words,

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[7] See *General Shoe Corporation*, 77 NLRB 124, 126-127.

[8] See Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 46, 92 (1964).

[9] *N.L.R.B.* v. *Babcock & Wilcox*, 351 U.S. 105.

[10] A union that does not know the names or addresses of some of the voters may seek to communicate with them by distributing lit-

by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation.

Nor are employee names and addresses readily available from sources other than the employer. The names of some employees may be secured with the assistance of sympathetic fellow employees, but, in a large plant or store, where many employees are unknown to their fellows, this method may not yield the names and addresses of a major proportion of the total employee complement.[11] Additionally, there are not infrequently employees on layoff status, sick leave, leave of absence, military leave, etc., eligible to vote,[12] yet unknown to their fellow employees. Furthermore, employees are frequently known to their fellows only by first names or nicknames, so that there may be significant problems in obtaining the home addresses even of those employees whose names are known. Finally, all the foregoing difficulties are compounded by the more or less constant turnover in the employee complement of any employer.[13]

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erature on sidewalks or street corners adjoining the employer's premises or by utilizing the mass media of communication. The likelihood that *all* employees will be reached by these methods is, however, problematical at best. See *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 130 (C.A. 2), cert. denied 376 U.S. 951. Personal solicitation on plant premises by employee supporters of the union, while vastly more satisfactory than the above methods, suffers from the limited periods of nonworking time available for solicitation (generally and legally forbidden during working time, *Peyton Packing Co.*, 49 NLRB 828, 843) and, in a large plant, the sheer physical problems involved in communicating with fellow employees.

[11] See, e.g., *The May Department Stores Co.*, 136 NLRB 797, 808, enforcement denied, 316 F. 2d 797 (C.A. 6), in which, after some 20 months of organizational effort, the union possessed names and addresses of only 1250 out of approximately 3000 eligible voters.

[12] *Vent Control, Inc.*, 126 NLRB 1134 (layoff); *Otarion Listener Corp.*, 124 NLRB 880 (sick leave); *Channel Master Corp.*, 148 NLRB 1343, (leave of absence); *Brown Cigar Company*, 124 NLRB 1435, 1437, footnote 3, (military leave).

[13] See 88 Monthly Labor Review, 1022-1024 (August 1965).

In sum, not only does knowledge of employee names and addresses increase the likelihood of an informed employee choice for or against representation, but, in the absence of employer disclosure, a list of names and addresses is extremely difficult if not impossible to obtain. Accordingly, as we have stated, we shall in the future regard an employer's refusal to make a prompt disclosure of this information as tending to interfere with prospects for a fair and free election.[14]

A requirement that all participants in an election contest have the opportunity to ascertain the names and addresses of the voters is not uncommon. Lists of registered voters in public elections are open to inspection and copying by the public.[15] When stockholders wish to participate in election contests (or other proxy contests), management either must provide them with the names and addresses of other stockholders or mail campaign

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[14] While we have discussed the importance of disclosure in the context of the typical case in which the employer and union are the parties engaged in communicating with the electorate, it should be noted that the requirement here imposed applies equally to the case in which an election has been directed upon a petition by an employee or group of employees who seek to decertify an existing bargaining representative or to rescind that representative's authority to enter into a union-security agreement of the sort otherwise authorized by Section 8(a)(3) of the Act. In these latter cases, the petitioning employees would be entitled to the names and addresses of their fellow employees as an aid in their efforts to communicate their arguments against continued union representation or continuance of an existing union-security agreement. Similarly, the union, as a party to the election, would be entitled to employees' names and addresses so as to communicate its position. In short, the disclosure requirement here adopted applies whenever a Board election has been scheduled and insures all parties to the election, whatever their viewpoint, of an opportunity to communicate with the electorate. The only exception is in the expedited election conducted pursuant to Section 8(b)(7)(C). In this situation, we believe that the time span between the direction of election and the conduct thereof is too brief, taking into account the time required for the employer to compile and file a list of names and addresses, for the union to be able to make any meaningful use of this information. Hence, in that limited situation, we do not require disclosure.

[15] 29 C.J.S. Elections § 50.

material for them.[16] Any candidate for union office is entitled to have the union distribute his campaign literature to all members.[17]

We see no reason why similar opportunities should not be available in a representation election. As one thoughtful commentator has stated, "Since the opportunity for both sides to reach all the employees is basic to a fair and informed election, the reasons for requiring disclosure seem just as strong as those leading to similar requirements under other provisions of the law." [18]

While the rule we here announce is primarily predicated upon our belief that prompt disclosure of employee names and addresses is necessary to insure an informed electorate, there is yet another basis upon which we rest our decision. As noted (*supra*, 5), an employer is presently under no obligation to supply an election eligibility list until shortly before the election. The list, when made available, not infrequently contains the names of employees unknown to the union and even to its employee supporters. The reasons for this are in large part the same as those that make it difficult for a union to obtain, other than from the employer, the names of all employees, i.e., large plants with many employees unknown to their fellows, employees on layoff status, sick leave, military leave, etc. With little time (and no home addresses) with which to satisfy itself as to the eligibility of the "unknowns", the union is forced either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote. The effect of putting the union to this choice, we have found, is to increase the number of challenges, as well as the likelihood that the challenges

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[16] 17 C.F.R. 240. 14a-7, 8.

[17] 73 Stat. 532, 29 U.S.C. § 481(c).

[18] Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 99-100 (1964); Cf. Summers, *Judicial Regulation of Union Elections*, 70 Yale L. J. 1221, 1227-1228 (1961). Another manifestation of the concept that all participants in an election should have access to the electorate is embodied in 48 Stat. 1088, as amended, 47 U.S.C. § 315(a), which provides for equal time for political candidates on radio and television.

will be determinative of the election, thus requiring investigation and resolution by the Regional Director or the Board. Prompt disclosure of employee names as well as addresses will, we are convinced, eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity. Furthermore, *bona fide* disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election when the significance of a single vote is apt to loom large in the parties' calculations. Thus, the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of questions of representation.

The arguments against imposing a requirement of disclosure are of little force, especially when weighed against the benefits resulting therefrom. Initially, we are able to perceive no substantial infringement of employer interests that would flow from such a requirement. A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect). Such legitimate interest in secrecy as an employer may have is, in any event, plainly outweighed by the substantial public interest in favor of disclosure where, as here, disclosure is a key factor in insuring a fair and free election. Cf. *N.L.R.B.* v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing *per curiam*, 235 F. 2d 319 (C.A. 9); *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149; *F.C.C.* v. *Schreiber*, 381 U.S. 279.

The main arguments that have been presented to us by the Employers and the *amici curiae* supporting the Employers relate not to any infringement of *employer* rights flowing from a disclosure requirement but rather to an asserted infringement of *employee* rights. Thus, it is argued that if employees wished an organizing union to have their names and addresses, they would present the

union with that information. By compelling the employer to provide the union with information that the employees have chosen not to divulge, the Board, it is asserted, compels employer interference with the Section 7 right of employees to refrain from union activities. We regard this argument as without merit. An employee's failure to provide a union with his name and address, whether due to inertia, fear of employer reprisal, or an initial predisposition to vote against union representation, is not, as we view it, an exercise of the Section 7 right to refrain from union activity. Rather, in the context with which we are here concerned—a Board-conducted representation election—an employee exercises this right by voting for or against union representation.

Similarly, we reject the argument that to provide the union with employee names and addresses subjects employees to the dangers of harassment and coercion in their homes. We cannot assume that a union, seeking to obtain employees' votes in a secret ballot election, will engage in conduct of this nature; if it does, we shall provide an appropriate remedy.[19] We do not, in any event, regard the mere possibility that a union will abuse the opportunity to communicate with employees in their homes as sufficient basis for denying this opportunity altogether. See *Martin* v. *City of Struthers*, 319 U.S. 141; *Staub* v. *City of Baxley*, 355 U.S. 313.[20]

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[19] See *Poinsett Lumber & Mfg. Co.*, 116 NLRB 1732; *Orleans Mfg. Co.*, 120 NLRB 630, 634; *Plant City Welding and Tank Company*, 119 NLRB 131, 133-134.

[20] Another argument made against disclosure of employee names and addresses in connection with an election proceeding is that a union might petition for an election with no real intention of participating therein, but solely to obtain employee names and addresses, intending, on receipt thereof, to withdraw the election petition and utilize its newly-acquired information as a basis for further organizational efforts. We think that the likelihood of such misuse of the Board's processes is minimized by our practice of requiring at least a 30 percent showing of representation before further processing the usual RC (union) petition, and also by our practice of imposing (absent a showing of good cause to the contrary) a 6-month ban on entertaining an election petition filed by a union which has withdrawn from an election after a hearing has

The argument is also made (by the Employer in the *Excelsior* case) that under the decisions of the Supreme Court in *N.L.R.B.* v. *Babcock & Wilcox*,[21] and *N.L.R.B.* v. *United Steelworkers (Nutone, Inc.)*,[22] the Board may not require employer disclosure of employee names and addresses unless, in the particular case involved, the union would otherwise be unable to reach the employees with its message. We disagree. We think that the issue presented by these cases is distinguishable from that presented in *Babcock* or *Nutone* and that, even assuming the availability of other avenues by which a union *might* be able to communicate with employees, we may properly require employer disclosure of employee names and addresses so as to *insure* the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election.

Initially, as we read *Babcock* and *Nutone*, the existence of alternative channels of communication is relevant only when the opportunity to communicate made available by the Board would interfere with a significant employer interest—such as the employer's interest in controlling the use of property owned by him. Here, as we have shown, the employer has no significant interest in the secrecy of employee names and addresses. Hence, there is no necessity for the Board to consider the existence of alternative channels of communication before requiring disclosure of that information. Moreover, even assuming that there is some legitimate employer interest in nondisclosure, we think it relevant that the subordination of that interest which we here require is limited to a situa-

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been held or a consent-election agreement approved by the Regional Director. See *Campos Dairy Products, Ltd.*, 107 NLRB 715. In any event, in view of the importance of disclosure for a fair and free election, we do not regard the bare possibility that *some* unions may misuse the information disclosed as grounds for our denying *all* unions (as well as employees who seek to unseat unions, see footnote 14, *supra*) access to employee names and addresses.

[21] 351 U.S. 105.

[22] 357 U.S. 357.

tion in which employee interests in self-organization are shown to be substantial. For, whenever an election is directed (the pre-condition to disclosure) the Regional Director has found that a real question concerning representation exists; when the employer consents to an election, he has impliedly admitted this fact.[23] The opportunity to communicate on company premises sought in *Babcock* and *Nutone* was not limited to the situation in which employee organizational interests were substantial, i.e., in which an election had been directed; we think that on this ground also the cases are distinguishable. Finally, both *Babcock* and *Nutone* dealt with the circumstances under which the Board might find an employer to have committed an unfair labor practice in violation of Section 8 of the Act, whereas the instant cases pose the substantially distinguishable issue of the circumstances under which the Board may set aside an election. "[T]he test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)."[24] Whether or not an employer's refusal to disclose employee names and addresses after an election is directed would constitute "interference, restraint, or coercion" within the meaning of Section 8(a)(1) of the Act, despite the existence of alternative channels of communication open to the union, is a question on which we express no view because

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[23] Section 9(c)(1), NLRA; see, also, Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Sec. 101.18, 29 C.F.R. 101.18. We also require disclosure when an election is directed pursuant to an employee petition to decertify a currently recognized union or to rescind the authority of such a union to enter into a "union-shop" agreement. See footnote 14; *supra*. In these situations, the employee interest, though opposed to union representation or membership, is also required to be substantial before an election will be directed. See Section 9(c)(1)(A)(ii), 9(e)(1), NLRA; Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Section 101.18, 101.27, 29 C.F.R. 101.18, 101.27.

[24] *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787; see also *General Shoe Corporation*, 77 NLRB 124, 126-127.

it is not before us. However, we are persuaded, for the reasons previously stated, that disclosure is one of the "safeguards necessary to insure the fair and free choice of bargaining representative by employees" [25] and that an employer's refusal to disclose, regardless of the existence of alternative channels of communication, tends to interfere with a fair and free election. Thus *Babcock* and *Nutone*, which dealt with the substantially different issue of whether the employers' conduct violated Section 8(a)(1), are, for this reason also, inapposite.

Finally, we wish to state our reasons for rejecting the approaches to the disclosure issue suggested by questions II and III in the Notice of Hearing. We do not limit the disclosure requirement to the situation in which the employer has mailed antiunion literature to employees' homes (question II) because we believe that access to employee names and addresses is fundamental to a fair and free election regardless of whether the employer has sent campaign propaganda to employees' homes.[26] We do not limit the requirement of disclosure to furnishing employee names and addresses to a mailing service (question III) because this would create difficult practical problems and because we do not believe that the union should be limited to the use of the mails in its efforts to communicate with the entire electorate.[27]

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[25] *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, 330; see also *N.L.R.B.* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226.

[26] Compare *May Department Stores Co.*, 136 NLRB 797, enforcement denied, 316 F. 2d 797 (C.A. 6); *Montgomery Ward & Co.*, 145 NLRB 846, enfd. in part, 339 F. 2d 889 (C.A. 6).

[27] See *S. & H. Grossinger's, Inc.*, 156 NLRB No. 20. See, also, Eldersveld and Dodge, "Personal Contact or Mail Propaganda: An Experiment in Voting Turnout and Attitude Change" in Katz, *Public Opinion and Propaganda*, 532, 541 (1954); Karsh, *Diary of a Strike* 106 (1958); Klapper, *The Effects of Mass Media*, pt. 2, pp. 9-14 (1949).

In the briefs and arguments of the Employers and *amici curiae* supporting the Employers, much has been made of Board decisions setting aside representation elections because an employer or his agents called upon all or a majority of employees in their homes in the period preceding the election. See, e.g., *Peoria Plastic Co.*, 117 NLRB 545. The argument is made that it would be inequitable

Inasmuch as the rule we have here announced is to be applied prospectively only (see footnote 5, *supra*), we reject Petitioners' exceptions to the Regional Directors' recommendations with respect to Objection No. 2 in both *Kellogg* and *Excelsior*. As we have also rejected the Petitioner's remaining exceptions in *Excelsior*, we shall accept the Regional Director's recommendation and certify the results of that election. With respect to *Kellogg*, while we have rejected the Joint Petitioners' exception to the Regional Director's recommendation as to Objection No. 2, the Employer has filed exceptions to the Regional Director's recommendation that the election be set aside on the basis of two campaign letters sent by the Employer and that a new election be directed. We have read the letters of the Employer in their entirety and the Union's propaganda and conclude that, under all the circumstances, the Employer's letters could clearly be evaluated by the employees as partisan electioneering and do not warrant setting the election aside.[28] Accordingly, we shall also certify the results of that election.

CERTIFICATIONS OF RESULTS OF ELECTIONS

IT IS HEREBY CERTIFIED, in *Excelsior Underwear Inc. and Saluda Knitting Inc.*, Case No. 11-RC-1876, that a majority of the valid ballots has not been cast for Amalgamated Clothing Workers of America, AFL-CIO, and that the said labor organization is not the exclusive representative of the employees in the unit herein found appropriate, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

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for the Board to preclude employers from visiting employees in their homes and at the same time insist that unions be furnished with employee names and addresses so that they may engage in home visits. The short answer to this argument is that employers are free to communicate with their employees in the plant; a union, as a practical matter, is severely limited in its efforts at in-plant communications. See *Plant City Welding and Tank Co.*, 119 NLRB 131, 133-134; see, also, footnote 10, *supra*.

[28] Member Brown would accept the Regional Director's findings and recommendation.

IT IS HEREBY CERTIFIED, in *K. L. Kellogg & Sons*, Case No. 21-RC-8955, that a majority of the valid ballots has not been cast for International Union of Operating Engineers, Local No. 3, AFL-CIO, and International Union of Operating Engineers, Local Union No. 12, AFL-CIO, and that said labor organizations are not the exclusive representative of the employees in the unit herein found appropriate, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman

JOHN H. FANNING, Member

GERALD A. BROWN, Member

HOWARD JENKINS, JR., Member

SAM ZAGORIA, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

EXHIBIT D.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

Case No. 1-RC-9073

In the Matter of

WYMAN-GORDON COMPANY Employer

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO Petitioner

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO Intervenor

SUPPLEMENTAL DECISION

Pursuant to a Decision and Direction of Election by the Regional Director, dated September 6, 1966, an election among certain employees of the Employer was held on September 29, 1966.[1] The Tally of Ballots cast at said election is as follows:

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[1] The unit found appropriate is as follows: All production and maintenance employees including power plant employees, cafeteria employees, leaders, hourly-rated laboratory employees, and model makers, employed by the Employer at its Worcester, North Grafton, and Millbury, Massachusetts plants, but excluding office clerical employees, plant clerical employees, salaried laboratory and all engineering employees, time keepers, time study employees, professional employees, guards and watchmen, dispatchers, assistant foremen, working foremen, and all supervisors as defined in the Act.

Approximate number of eligible voters	1750
Void ballots	10
Votes cast for International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO	226
Votes cast for United Steelworkers of America, AFL-CIO	555
Votes cast against participating labor organizations	903
Valid votes counted	1684
Challenged ballots	6
Valid votes counted plus challenged ballots	1690

On September 30, 1966, the Intervenor filed timely Objections to Conduct Affecting Results of the Election, serving copies on the other parties. These Objections allege the following:

"1) The Employer did not provide an election eligibility list as required by *Excelsior Underwear, Inc.*, 156 NLRB No. 111.

"2) By this and other acts, the Employer violated the Act and the Board's Rules relating to pre-election conduct."

On October 5, 1966, the Petitioner by telegram filed likewise timely Objections, in which it alleges the following:

"1. The Employer failed to provide an election eligibility list as required by *Excelsior Underwear, Inc.*, 156 NLRB No. 111.

"2. By this and other acts, the Employer violated the Act and the Board's Rules and Regulations relating to pre-election conduct."

Copies of these Objections were likewise served upon the other parties.

Pursuant to 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has conducted an investigation.

Because both sets of Objections raise identical issues, they will be treated together.

Investigation reveals:

1. The petition herein was filed on July 12, 1966. On July 13, the Employer was notified by letter of the filing of said petition and in Paragraph 4 of said letter was advised as follows:

> "4. In the event an election is agreed to or directed in this case, the Board requires that a list of names and addresses of all the eligible voters be filed by the employer with the undersigned, who will in turn make it available to all parties to the case. The list must be furnished to the undersigned *within seven (7) days* of the direction of or agreement to election. I am advising you now of this requirement so that you will have ample time to prepare for the eventuality that such a list may become necessary. This list is in addition to list requested in Item 1 for purposes of showing evidence of interest."

A hearing on the petition was held on August 26 and as stated, the Direction of Election issued on September 6. It contains a footnote 3 which reads as follows:

> "[3] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Massachusetts 02203, on or before September 13, 1966. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear, Inc.*, 156 NLRB No. 111."

On September 13, the election arrangements were discussed with representatives of the parties at the Regional Office and, as far as here material, the Employer agreed to furnish an eligibility list for the purpose of checking by the patries at a pre-election conference at the Holiday Inn, Worcester, Massachusetts, which was scheduled for September 26. The Employer did not agree to furnish a list including names and addresses to the parties as required by the Board in *Excelsior Underwear, Inc.*, 156 NLRB 111.' Both unions desired, nevertheless, to proceed with the election. Official Notices of Election were mailed to the parties on September 22, 1966 and posted during the required period throughout the plant by the Employer.

The Employer does not dispute to have been requested and to have refused to furnish the Unions with the type of list required under *Excelsior, supra.* In a letter to the Regional Office, dated October 13, 1966, the Employer stated its position as follows:

> "In regard to the first objection, it is the Company's position that (1) in promulgating the rule the Board did not comply with the provisions of the administrative Procedure Act and the rule is therefore invalid, (2) the rule constitutes an invasion of the right of privacy of the employees of the Company, (3) the rule is in direct violation of Section 302 of the Act and could result in criminal prosecution of the Employer, (4) the rule would require the Employer to violate provisions of the National Labor Relations Act under Section 8(a), (5) the rule constitutes the taking of property of the Company without due process of law, (6) the ruling of the Board requiring the submission of the mailing list is contrary to the decisions of the Supreme Court in regard to the rights, or lack thereof, of Unions to be granted assistance from an Employer in their organizational campaigns when other adequate facilities and opportunities for organizational activity are readily available to them, (7) the rule of the Board, in violation of the principles of the Act, promotes an invalid dual standard of conduct between Unions and Employers insofar as there is a disparity of treatment in regard to Union

visitation in the homes and Company visitation, and (8) in the instant case there is no need for the giving of lists containing names and addresses of employees inasmuch as it is our understanding that immediately prior to the election both Unions mailed to our employees, at their homes, Union propaganda. Inasmuch as both Unions had available to them mailing lists, the requirement that the Company comply with the *Excelsior* rule is not applicable in the instant proceeding."

The Employer also requested that a hearing be held on the Items 3, 5 and 8 set forth above since they "raise issues of fact." The undersigned disagrees as to Items 3 and 5 and is of the opinion that they do not raise issues of facts warranting a hearing. As to Item 8, both Unions disclaim to have received from any other source a complete list of names and addresses of all employees in the unit found appropriate. It will be noted that the Employer does not assert that the Unions had a complete list available and merely alleges that it is its "understanding" that the Unions mailed propaganda to the homes of employees. Under these circumstances, the undersigned believes that a hearing on the matter raised in Item 8 of the Employer's letter would likewise serve no useful purpose.

Adverting to the substance of Employer's arguments, it is well known that *Excelsior* issued only after oral argument and briefs, including *amicus curiae* briefs by interested parties. The Board has considered arguments such as those made here and nevertheless established the requirement embodied in *Excelsior* and the undersigned is bound by it.

Accordingly, and because the Board "regard(s) a refusal to furnish the information in question as tending to interfere with the prospects for a fair and free election", merit is found to this Objection.

2. No further evidence was adduced by either objecting party in support of this Objection, although opportunity to do so was given. This Objection is, therefore, found to lack merit.[2]

---

[2] *Felix Bonura Co.*, 119 NLRB 1620.

Having found merit to Objection 1, the undersigned sets the election held on September 29 aside and will conduct a new election at a place and time to be determined. Eligible to vote will be those employees in the unit employed during the payroll period immediately preceding the issuance of the new notices of election.

An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days after the date of the issuance of the notice of the second election by the Regional Director. The Regional Director shall make the list available to all parties to the election. Under Board directives, no extension of time to file this list may be granted, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear, Inc.*, 156 NLRB No. 111.

Dated at Boston, Massachusetts, this 19th day of October, 1966.

/s/ ROBERT E. GREENE
ROBERT E. GREENE,
Acting Regional Director
National Labor Relations Board
First Region
Boston, Massachusetts

EXHIBIT E.

[25102 EVDAC

221715 [13013 MSCEV344744
RAAU JHZ RUEVDEL0019 3202200-UUUU—RUEVDAC.
FM HOWARD W KLEEB ASSO EXE SEC NLRB WASHINGTON DC
TO RUEVDAC/3/HERRICK SMITH DONALD FARLEY KETCHUM ATT QUENTIN YOUNG ESQ 294 WASH ST BOSTON MASS
TO RUEVDAC/3/ANGOFF GOLDMAN MANNING PYLE ATT ROBERT D MANNIN? ESQ 44 SCHOOL ST BOSTON MASS
TO RUEVDAC/3/NLRB BOSTON MASS
BT
RE: WYMAN-GORDON, 1-RC-9078. IT IS HEREBY ORDERED THAT THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION BE, AND IT HEREBY IS, DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD—:
BT

EXHIBIT F.

December 1, 1966

Quentin Young, Esq.
c/o Herrick, Smith, Donald, Farley & Ketchum
294 Washington Street, Boston, Massachusetts

Vincent J. Curran, Intl. Rep.
International Brotherhood of Boilermakers,
Iron Shipbuilders et al
1 Greenwood Street
Worcester, Massachusetts

Robert D. Manning, Esq.
Angoff, Goldman, Manning & Pyle
44 School Street
Boston, Massachusetts

Re: Wyman-Gordon Company
Case No. 1-RC-9073

Gentlemen:

This is to notify you that a re-run election in accordance with the Regional Director's Supplemental Decision of October 19, 1966 will be held on Thursday, December 29, 1966 in the same locations and with the same hours as in the previous election at both the Worcester and North Grafton plants. Eligible employees are those on the payroll for the week ending November 26, 1966 and a copy of the Notice of Election will be mailed to all parties on December 2. If the Employer should fail to comply with the requirement of giving a list of names and addresses within seven days from the issuance of the Notice of Election, it is probable that the Board in Washington will seek a subpena to require the production of such list and also seek enforcement of such in the appropriate court and, therefore, that the election which is set for December 29 would not be carried out. If the Company should change from its previous position and in this re-run election submit the requested list of names and addresses, copies will be made available to all parties immediate and

a short postponement of the date from the holiday period would probably be entertained to the benefit of all concerned. The above procedural problems have been discussed with each of the addresses by phone prior to this letter but if any of the parties have any questions concerning this matter they may call the undersigned at their convenience at 223-3350. Thank you for your cooperation in this matter.

Very truly yours,

JOSEPH C. BARRY
Supervisory Examiner

cc: Wyman-Gordon Company
105 Madison Street
Worcester, Massachusetts

Russell N. Berg
750 New Brotherhood Building
Kansas City, Kansas

Charles F. Moran, Intl. Vice Pres.
25 West 49th Street, Rm. 1203
New York, N.Y.

United Steelworkers of America, AFL-CIO
29 Pearl Street
Worcester, Massachusetts

EXHIBIT G.

SUBPENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To James W. Stoddard, President
Wyman-Gordon Company, 105 Madison Street, Worcester, Massachusetts

Request therefor having been duly made by Michael F. Walsh, Counsel for the Regional Director, National Labor Relations Board *whose address is* John F. Kennedy Federal Building Cambridge & New Sudbury Boston Massachusetts

You are hereby required and directed to appear before Albert J. Hoban, Regional Director, or his designated representative of the First Region *of the National Labor Relations Board, at* 20th Floor, National Labor Relations Board, J.F.K. Federal Bldg., Cambridge and New Sudbury Streets *in the City of* Boston, Massachusetts *on the* 30th *day of* December, *1966, at* 1:00 *o'clock* p.m. *of that day, to testify in the Matter of* WYMAN-GORDON COMPANY Case No. 1-RC-9073

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents: See Appendix

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance hereof.

Issued at Boston, Massachusetts *this* 27th *day of* December, *1966*

HOWARD JENKINS, JR

APPENDIX

The books and records of Wyman-Gordon, 105 Madison Street, Worcester, Massachusetts, containing the names and addresses of all employees employed at Wyman-Gordon Company during the payroll period immediately preceding October 19, 1966 in the following collective bargaining unit:

> All production and maintenance employees including power plant employees, cafeteria employees, leaders, hourly-rated laboratory employees, and model makers, employed by the Employer at its Worcester, North Grafton, and Millbury, Massachusetts plants, but excluding office clerical employees, plant clerical employees, salaried laboratory and all engineering employees, time keepers, time study employees, professional employees, guards and watchmen, dispatchers, assistant foremen, working foremen, and all supervisors as defined in the Act.

In lieu of the above corporate books and records the Regional Director will accept a list containing the subpenaed information. The list must be signed by an officer of the corporation who is authorized to do so. The list in lieu of corporate books and records will be accepted after designated agents of the National Labor Relations Board have verified its contents by examination of the subpenaed books and records at a time and place convenient to the corporation but not later than the date of appearance specified in the subpenas.

[Receipt of mail attached.]

EXHIBIT H.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

Case No. 1-RC-9073

In the Matter of

WYMAN-GORDON COMPANY Employer

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO Petitioner

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO Intervenor

MOTION TO QUASH

Comes now Robert W. Stoddard, for himself and as President of Wyman-Gordon Company, by counsel, Herrick, Smith, Donald, Farley & Ketchum, in answer to the Subpena Duces Tecum issued under the name of Howard Jenkins, Jr., to James W. Stoddard, as President (Mr. Stoddard's correct name being Robert W. Stoddard), # B61000, dated December 27, 1966 and in response thereto moves the Board to quash said subpena on the following grounds:

1. That said subpena was issued on the basis of a Decision of the National Labor Relations Board, to wit Excelsior Underwear, Inc., 156 NLRB No. 111.

2. That the rules and regulations the Board has attempted to establish in Excelsior are unconstitutional, invalid, and unauthorized under the provisions of the Na-

tional Labor Relations Act, as amended, for the following reasons:

A. In promulgating the Excelsior rule, the Board did not comply with the provisions of the Administrative Procedure Act (5 USCA, Chapter 19, Section 1001 *et seq*) and the rule is therefore invalid.

B. The Excelsior rule constitutes an invasion of the right of privacy of the employees of the Employer.

C. The Excelsior rule constitutes the taking of property of the Employer without due process of law.

D. The Excelsior rule requiring the submission of a mailing list to the Board is contrary to decisions of the United States Supreme Court in regard to the rights, or lack thereof, that Unions be granted assistance from an Employer in their organizational campaigns when other adequate facilities are readily available to them.

E. The Excelsior rule is in violation of the principles of the Act insofar as it promotes an invalid dual standard of conduct between Unions and Employers insofar as there is a disparity of treatment in regard to Union visitation in the homes of the employees and a prohibition against the Employer for the same type of solicitation.

F. In the instant case there is no need for the giving of lists containing names and addresses of employees inasmuch as it is the Employer's understanding that immediately prior to the election both Unions mailed to its employees, at their homes, Union propaganda. Inasmuch as both Unions had available to them mailing lists, the requirement that the Company comply with the Excelsior rule is not applicable in the instant proceeding.

G. The Excelsior rule is in clear violation of the provisions of Section 8 (a) (2) of the Act, which prohibits an employer to give assistance to a labor organization seeking to represent its employees.

H. The Excelsior rule would require the Employer to violate Section 302 (a) (2) of the Act.

3. That said subpena calls for the production of records exceeding the Board's lawful authority.

4. That the information required by said subpena does not come within the provisions of Section 11 (2) of the

aforesaid Act and that the Board is without legal authority to issue said subpena.

Now, therefore, Robert W. Stoddard individually and as President of Wyman-Gordon Company, through counsel respectfully requests the Board to quash, nullify and withdraw said Subpena.

Respectfully submitted,

HERRICK, SMITH, DONALD,
FARLEY & KETCHUM

By QUENTIN O. YOUNG
QUENTIN O. YOUNG

December 30, 1966

EXHIBIT I.

Albert J. Hoban
Director, NLRB
Boston, Massachusetts

Quentin O. Young
Herrick, Smith, Donald,
Farley & Ketchum
294 Washington Street
Boston, Massachusetts

International Brotherhood of
Boilermakers, etc.
Att: Vincent J. Curran
1 Greenwood Street
Worcester, Massachusetts

Robert D. Manning
Angoff, Goldman, Manning &
Pyle
44 School Street
Boston, Massachusetts

RE: WYMAN-GORDON COMPANY, 1-RC-9073. IT IS HEREBY ORDERED THAT EMPLOYER'S PETITION TO REVOKE SUBPENA DUCES TECUM BE, AND IT HEREBY IS, DENIED. BY DIRECTION OF THE BOARD:

ROBERT VOLGER
Associate Executive Secretary
National Labor Relations Board

RV:har Order Section 5958 January 10, 1967 3:10 pm

ANSWER.

[Filed April 18, 1967.]

Come now the defendants, Wyman-Gordon Company and Robert W. Stoddard as Chairman of the Board of Directors and Chief Executive Officer of Wyman-Gordon Company by their attorneys, Herrick, Smith, Donald, Farley & Ketchum, and in answer to said complaint allege as follows:

COUNT I

1. As to paragraph No. 1, the defendants admit the allegations contained therein.

2. As to paragraph No. 2, the defendants deny that James W. Stoddard is President of Wyman-Gordon Company but admit that Robert W. Stoddard is Chairman of the Board of Directors and Chief Executive Officer of Wyman-Gordon Company and admit the remaining allegations contained in said paragraph.

3. As to paragraph No. 3, the defendants deny that this District Court has jurisdiction in the instant proceeding to enforce the subpoena of the Board.

4. As to paragraph No. 4, the defendants admit the allegations contained therein.

5. As to paragraph No. 5, the defendants admit the allegations contained therein.

6. As to paragraph No. 6, the defendants admit the allegations contained therein.

7. As to paragraph No. 7, the defendants admit the allegations contained therein.

8. As to paragraph No. 8, the defendants admit the allegations contained therein.

9. As to paragraph No. 9, the defendants admit the allegations contained therein.

10. As to paragraph No. 10, the defendants admit the allegations contained therein.

11. As to paragraph No. 11, the defendants admit the allegations contained therein except that they deny that the alleged rule in the *Excelsior* case is a valid rule of the Board.

12. As to paragraph No. 12, the defendants admit the allegations contained therein except that they deny that the *Excelsior* rule is a valid rule of the Board and deny the allegation that such rule promotes communication of election issues or aids in the chellenging of ballots of employees believed ineligible to vote.

13. As to paragraph No. 13, the defendants admit the allegations contained therein except that they deny that the *Excelsior* rule is a valid rule of the Board.

14. As to paragraph No. 14, the defendants admit the allegations contained therein.

15. As to paragraph No. 15, the defendants admit the allegations contained therein but deny the validity of the *Excelsior* rule.

16. As to paragraph No. 16, the defendants deny the allegations contained therein.

17. As to paragraph No. 17, the defendants admit the allegations contained therein but deny the validity of the *Excelsior* rule.

18. As to paragraph No. 18, the defendants admit the allegations contained therein except that they deny that James W. Stoddard is President of the defendant company but admit that Robert W. Stoddard is Chairman of the Board of Directors and Chief Executive Officer of the defendant company.

19. As to paragraph No. 19, the defendants deny the allegations contained therein in reference to James W. Stoddard but admit the allegations contained therein in regard to Robert W. Stoddard.

20. As to paragraph No. 20, the defendants admit the allegations contained therein.

21. As to paragraph No. 21, the defendants deny the allegations contained therein in reference to James W. Stoddard but admit the allegations contained therein in regard to Robert W. Stoddard.

22. As to paragraph No. 22, the defendants deny the allegations contained therein.

COUNT II

1. As to paragraph No. 1, the defendants repeat the answers set forth above and as if fully set forth here in paragraphs 1 through 22.

2. As to paragraph No. 2, the defendants deny that the statutes cited in said paragraph grant jurisdiction to this Court over the substance of this litigation.

3. As to paragraph No. 3, the defendants admit the allegations contained therein.

4. As to paragraph No. 4, the defendants deny that the Board acted within its statutory jurisdiction in establishing the election rule of the *Excelsior* decision.

5. As to paragraph No. 5, the defendants deny the allegations contained therein.

AFFIRMATIVE DEFENSE

As and for an affirmative defense, the defendants allege as follows:

1. In promulgating the *Excelsior* rule, the Board did not comply with the provisions of the Administrative Procedure Act (5 USCA, Chapter 19, Section 1001 *et seq*) and the rule is therefore invalid.

2. The *Excelsior* rule constitutes an invasion of the right of privacy of the employees of the employer.

3. The *Excelsior* rule is contrary to the decisions of the courts, including the United States Supreme Court.

4. The *Excelsior* rule is inapplicable to the present case inasmuch as the unions had adequate access to the employees, their names and home addresses.

5. The *Excelsior* rule is in violation of the provisions of Section 8(a)(2) of the Act, which prohibits an employer's giving assistance to a labor organization seeking to represent its employees.

6. The *Excelsior* rule would require the Employer to violate Section 302(a)(2) of the Act, and the demand of the Board is a violation of Section 302(b)(1).

7. The subpoena calls for the production of records exceeding the Board's statutory authority; and the information required by said subpoena does not come with-

in the provisions of Section 11(2) of the Act; and the Board is without statutory authority to issue said subpoena and the Court is without jurisdiction to enforce it, insofar as it does not call for the production of testimony or evidence.

Wherefore, defendants Robert W. Stoddard, individually and as Chairman of the Board of Directors and Chief Executive Officer of Wyman-Gordon Company, and Wyman-Gordon Company respectfully pray:

(a) That the complaint herein be dismissed in its entirety;

(b) That in the alternative an order be issued denying the Plaintiff's request for an order to show cause;

(c) That the Board be directed pursuant to Section 9 of the National Labor Relations Act (29 U.S.C., Sec. 151 *et seq*) to issue a certification of the results of the election and to declare that neither union has the right to represent the employees of the defendant, Wyman-Gordon Company;

(d) That defendants, Robert W. Stoddard as Chairman of the Board of Directors and Chief Executive Officer of Wyman-Gordon Company and Wyman-Gordon Company have such other and further relief as may be necessary and appropriate in the premises.

HERRICK, SMITH, DONALD,
FARLEY & KETCHUM

By QUENTIN O. YOUNG

EXHIBIT A.

NATIONAL LABOR RELATIONS BOARD
REGION 1

John F. Kennedy Federal Building
Cambridge and New Sudbury Streets
Boston, Massachusetts 02203

Telephone 223-3300
July 13, 1966

Wyman-Gordon Company
105 Madison Street
Worcester, Massachusetts

Re: Wyman-Gordon Company
Case No. 1-RC-9078

Gentlemen:

This is to advise you that a petition (copy attached) seeking investigation and certification of representatives, pursuant to Section 9 (c) of the National Labor Relations Act, as amended, has been filed in this office by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO

This case has been assigned to Benjamin Smith, Attorney whose telephone number is 223-3337 and who will contact you to the end that, if appropriate, the question of representation may be resolved by secret ballot election to be conducted under the supervision of this office.

It will be appreciated if you will meanwhile prepare and submit to this office the following:

1. An alphabetized list of all employees in the unit involved in the petition, this list to be prepared for the payroll period immediately preceding the date of this letter and to include job titles or work classifications;

2. Copies of any contracts which you may have with any labor organizations covering any employees in the unit involved in the petition;

3. Copies of any correspondence bearing on the question of representation herein.

4. In the event an election is agreed to or directed in this case, the Board requires that a list of names and addresses of all the eligible voters be filed by the employer with the undersigned, who will in turn make it available to all parties to the case. The list must be furnished to the undersigned *within seven (7) days* of the direction of or agreement to election. I am advising you now of this requirement so that you will have ample time to prepare for the eventuality that such a list may become necessary. This list is in addition to list requested in Item 1 for purposes of showing evidence of interest.

Very truly yours,

ALBERT J. HOBAN
ALBERT J. HOBAN
Regional Director

Enclosure:

cc: Boilermakers, AFL-CIO
1 Grenwood St.
Worcester, Mass.
Attn: Vincent J. Curran, Int. Rep.
Russell K. Berg
570 New Brotherhood Bldg.
Kansas City, Kansas 66101
Charles F. Moran, I.V.P.
Boilermakers, AFL-CIO
25 West 45th St., Rm. 1203
New York, N.Y. 10036

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" Marion Mrs labeler US Envelope h28 Shirley
" Robt D mech Henry Wilson r65 Mason
" Robt F reporter WT&G r Rutland
" Ronald R slsmn Employers Mut of Warsaw r Northboro
" Westill C (Barbara L) customer eng IBM h53 Butter
Sarkendall Bertha L (wid Henry L) social wkr Guild of St Agnes Day Nursery h2 Hancock Hill dr
" Henry L (Maureen E) phys 21 West h134 Newton av N
Sirkilis Andrew J (Kath) retd h32 Ripley
" Kath Mrs lodgings 20 John h do
Sirklauskas Barbara A tchr Burncoat Jr High Sch r10 Upsala
" Jos P (Ann) press opr WG h70 Upsala
" Peter retd h58 Cutter
" Thos J studt r70 Upsala
Sirkorian Geo J (Mary C) baker Langones Bakery (Westboro) h21 St Kevin rd
" Geo J jr studt r21 St Kevin rd
Sirkos Arth lab Geo Kirkos r172a Austin
" Geo (Harriet) mason 172a Austin h do
" Kiry mason Geo Kirkos r172a Austin
Sirkpatrick Carol A clk MPA r Sterling
" Chas D die mkr Hultgren Mfg r Millbury
" Chas D (Cath S) wire wkr Thompson Wire h26 Lavallee ter
" Helen B (wid Steph E) h34 Chestnut
" Janet E studt r10 Brookshire rd
" Richd D lab Francis Harvey & Sons r15 Gordon
" Richd M (Claire C) constn wkr h15 Gordon
" Thos H (Margt C) v-pres-actuary MPA h10 Brookshire rd
Sirmel Anthony (Sophie) lab A Amorello & Sons h26 Ward
" Mary A r26 Ward
Sirminas Algird P emp USS r44 Mendon
" Bernice r44 Mendon
" Casimer (Antoinette) h44 Mendon
Sirouac Rene B sht mtl wkr NCo r Leominster
Sirousis Geo r654 Main
Sirrana Martin r43 Converse
Sirsch Irving (Bertha) dept mgr Paul Hats h3 Sherwood rd
" Robt r3 Sherwood rd
Sirschner Louis (Tillie) retd h946 Pleasant
" Marie Mrs slswn Richd Healy Co r32 Lake av
Sirusis Geo (Theodora) bartndr h127 Highland
Sirvilaitis Anthony (Irene P) patenter Natl Stand h17 Duxbury rd
" Irene P Mrs aide Hahnemann Hosp r17 Duxbury rd
Sirwan see also Kerwin & Kirwin
" Kathleen V Mrs clk Worc County Natl Bk r65 Warner av
" Patk J (Kath V) asst chf probation ofcr Central Dist Ct h85 Warner av
Sirwin John J driver Yellow Cab r3 Stoneland rd
" Raymond F (Jean P) installer NET&T h16 Stoneland rd
" Rhoda M clk MPA r3 Stoneland rd
" Ruby M (wid John J) retd h22 Osceola av
" Wm F (Patricia A) driver A J Mattress h21 Great Brook Valley av apt 5
Sisielauskas Edw J (Lucille C) clk C&K h3 Benjamin rd
" Margt M r30 Arthur
Sisiel Adela E (wid Jos) h87 Perry av
" Chesiaw h27 Ellsworth
" Edmund J (Hedwig R) clk Perry Avenue Mkt h39 Perry av
" Helen stitcher Jerah Neckwear r4 Sigel
" Irene Mrs stitcher Jerah Neckwear h4 Sigel

KISIEL
" Henry F (Clara B) policemn City Police Dept h31 Ayrshire rd
" Josephine clk Muir's Lndry r West Boylston
" Mathew J (Sally) insp WG r224 Providence
" Peter retd h3 Camden av
" Richd W studt r144 Kendig
" Stefania Mrs insulator H H Brown Shoe r27 Ellsworth
" Wm J (Anna T) slsmn h144 Kendig
Kisielaitis Jos (Julia) tailor Hayward Tailors h26 Derby
" Victor studt r26 Derby
Kisielatis Pravis (Mary) retd h63 Waverly
Kisielsis Peter P (Frances) retd h114 Vale
Kisk Beatrice D (wid Albert W) cook Anna Maria College hl Tallawanda dr
Kisiak Mary (wid Jos) h3 Arwick av
Kislik Abr (Pauline) retd h4 Loxwood
Kissel Beatrice T (wid Jos) retd h14 S Ward
" Rita A bkpr Morse Bros Elec r14 S Ward
Kissell Gerald P designer NCo r Jefferson
" Gustaf C lab Stand Fdry r3 Maxwell ct
" Jas insp WG (G) h3 Maxwell ct
" Peter opr USS h3 Maxwell ct
" Wm J (Lorraine M) furnace wkr WG h28 Gediminas
Kisten Peter A (Edna) mach USS h14 S Ward
" Richd L mach Heald r14 S Ward
" Walter bartndr Ed Smith's Restr r76 Perry av
Kistle Harold mgr Airco-Worc Welding Sup r Paxton
Kitchen Contractors Inc Doris P Blaum pres Edw B Blaum treas Rita S Paradise sec 268 Lincoln
Kitchings Alice M (wid Hillie S) h24 Ormond
" Vivian ofc sec Shrewsbury Library r24 Ormond
Kitonis Anthony J (Lillian) mixer Bay State Abrasives h42 Dorchester
" Raymond (Eleanora) retd h2 Lodi
Kitsalis Angelo retd h860 Main
Kitsos Harry (Areti) cln Table Talk h19 Ledge
Kittel Robt M exec v-pres Rand-Whitney Corp (corrugation div) r Holden
Kitteridge Patk retd h35 Boudoin
Kittredge Barbara studt r10 Lagrange
" Delia Mrs h10 Oxford
" Edw F studt r12 Sherburne av
" Edw J (Marie A) bmo Jamesbury Corp h36 Patch Reservoir dr
" Edw J retd h22 Cutler
" Edw P (Ellen E) retd h12 Sherburne av
" Electric Co Inc John J Kittredge pres electn 10 Lagrange
" Francis J (Theresa C) asst cash Worcester County National Bank h22 Brighton rd
" Irene A custdn Commerce Bldg r4 Arthur
" John J (John J Kittredge Monumental Wks) r72 Morningside rd
" John J (Bernice D) pres Kittredge Elec h10 Lagrange
" John J Monumental Works (John J Margt G and Jos J Kittredge) 152 Webster
" John P (Marie) field aud State DP Wel r Clinton
" Jos F (Mary) hoist opr Mass Elec h53 Beaver
" Jos F (Ann M) linemn New Eng Power h60 Oneida av
" Jos J (Madeline F; John J Kittredge Monumental Wks) h72 Morningside rd
" Louise F (wid Richd W) cook Shattuck Nursing Home h42a Maravista rd

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" Chester clerk Nissen Baking r Shrewsbury Mass
" Clarence W retd h9 Metcalf
" Clarence W jr (Jane G) supt N Co h1 Barry rd
" Clifford B jr comp WT&G r Grafton Mass
" David r30 Portland
" David studt r8 Mallard rd
" David L (Joan L) slsmn Harr Ford h6 Freeland
" Donald P studt r8 Mallard rd
" Douglas J (Joan C) mgr Electime Appliance Service h10 Winchester av
" Dwight C (Esther M) h53 Elm apt 42
" Edna M (wid Lester G) h10 Fruit
" Edw A clk Telechron h78 Providence
" Elizabeth M Mrs clk State Mut Life r Paxton Mass
" Emil G (Dorothy E) forger hlpr WG h481 Cambridge
" Eug emp WG r96 Green
" Eug E (Dorothy M) h13 Pleasant ter
" F Harold (Eleanor G) pres Worcester Academy h190 Salisbury
" Felix r728 Main
" Florence counter girl Messiers Diner r69 Providence
" Harold D (Lillian) supt L Farber Wilting r North Grafton Mass
" Hedwig (wid Adam) r78 Providence
" Henry G refgr dept N Co r Upton Mass
" House (Worcester Natural History Society) museum 21 Cedar
" John (Lois) emp WG h21 Washburn
" John F (Mary C) pharm Lambert Drug h179 June
" John J (Rose) retd h38 Sigel
" John L studt r6 Freeland
" Jos E retd h38 Belmont
" Jos F studt r179 June
" Jos J mach opr C&K r Webster Mass
" Julie R Mrs clk MPA r Cherry Valley Mass
" Lee E (Norma J) weaver Sherman Textile h27 Bellevue
" Leo W (Margt; Leo's Spa) h4 Cardinal rd
" Marclynne fnshr Dapol r37 Pemberton
" Marie clerk Russell Daniels Auto Sales r Paxton Mass
" Marie G Mrs mgr Wardwell Apartments h728 Main
" Marion F (wid Alfred) h134 Ingleside av
" Marjorie E Mrs fcty wkr Precmet Corp h878 Main
" May Mrs clerk Denholm's r179 June
" Michl studt r728 Main
" Mirabel supvr Amherst Retarded Children's Assn r35 Chestnut
" Napoleon T (Helen) foreman Stand Fdry r56 Dawson rd
" Norman L (Ann R) clk A&P h5 Nixon av
" Peter J (Florence A) shipper Nissen Bakery h69 Providence
" R Bawson (Cecile A) forman Montrose Products h8 Mallard rd
" Richd dishwasher Jewish Home for Aged r179 June
" Richd F (Ann M) sorter L Farber h21 Washburn
" Richd J (M Nerlin) mach opr Jamesbury Corp h43 Dawson rd

DANIELS
" Richd P studt r152 Chester
" Robt hlpr Bloomfield r30 Portland
" Robt formn L Farber r52 Seymour
" Robt J (Teresa E; Daniels Serv Sta) r Dudley Mass
" Robt L (Olive K) driver DeMambro Radio Sup h85 New Vista la
" Ronald K (Marilyn J) asmblr C&K h37 Pemberton
" Russell pres-treas Russell Daniels Auto Sales r Paxton Mass
" Russell W Auto Sales Inc Russell W Daniels used car sales 173 Stafford
" Service Station (Robt J Daniels) 1380 Main
" Sophia H (wid Anthony) retd h95 Ward
" Stella A Mrs nurse Worcester City Hosp r152 Chester
" Suzanne studt r1 Barry rd
" Victor J (Emma M; A L Purinton) h6 Judith rd
" Vyto C (Stella A) slsmn Craftsman Inc h152 Chester
" Wm T (Susan) sweeper John Bath h4 Reeves
" Wm T jr jig mkr C&K r Cherry Valley Mass
Danielson Axel T baker WS Hosp r305 Belmont
" David H (Ebba M) retd h10 Watson av
" Evelyn D Mrs sales wn Grant's r North Grafton Mass
" Floyd (Marilyn) bus mn (North Grafton) h45 Lancaster
" Frank E r21 Whipple
" Gordon V expediter N Co r54 Airlie
" Harvey emp VA Hosp (Beacon NY) h10 Denny
" Ida r835 Main
" Ingeborg (wid Olaf) retd h294 Lovell
" Jean E Mrs clerk People's Sav Bk r5 Rexhame rd
" Johanna r14 John
" Jos r5 Irving
" Marilyn E Mrs clk State Mut Life r45 Lancaster
" Merton E (Jean E) group leader N Co h5 Rexhame rd
" Norman G emp N Co r60 Washington (S)
" Otelia M (wid Arth G) h110 Leeds apt 2
" Paul H (Lillian M) retd h12 Wellington
" Rhondi studt r203 Moreland
" Richd h14 Crown
" Richd E porter Duprey Bldg r3 Charlton
" Victor C (Cora M) retd h54 Airlie
" Walter T (Mary G) clk Mass Elec h480 Sunderland rd
" Walter O (Gladys) stockmn Mass Elec Light h1 Ashland
Danilowicz Elaine S r14 Copperfield rd
" John W (Malvina S) driver Nissen Baking h14 Copperfield rd
" Joy M studt r14 Copperfield rd
" L Paul (Mary E) lwyr State Mut Life h16 Tupelo rd
" Mary E Mrs ofc sec State Mut Life r16 Tupelo rd
" Stanley J (Alfreda B; D Enterprises) h1 Claridge dr
Danis Richd R (Kath) reporter WT&G h19 Moore
Danisiewicz Frank J sweeper N Co
Dank Jos T (Alvina) sand mixer Stand Fdry h53 Canterbury
Danko Elaine K studt r71 Esther
" Jos J (Helen) die mkr Progressive Tool (Westboro) h71 Esther
" Michl J (Jean B) carp h15 Marion av
Dann Emil r97 Granite
" Lucy G slswn Richd Healey h45 Chatham
" Milton J (Esther) ofc mgr Arthur Hahn h97 Granite
Danna Anthony emp USS r4 Jennette
" Barbara A nurse Elton Yassina & Roy R Singer r2 Shamrock
" Domenic P (Helen L) asmblr C&K h197 Swenson av
" Dominic (Jennie) retd h23 Cross
" Nunzio J (Rose E) asmblr C&K h2 Shamrock
" Robt J (Mary L) custdn City School Dept h64 Gage
Dahneberger Arth (Constance M) insp H&R h4 Patch Reservoir dr
Danner Howard A treas Fitzpatrick Lease r Dover
" Wm A treas Parker-Danner r Brookline Mass
D'Annolfo Ralph (Assunta A) tailor Howard-Clothes h21 Elizabeth

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Hull Delia Mrs r27 Shelby
" Edna Mrs clk Livingston Camera Stores r4 Holland rd
" Evan B mach Geo J Meyer Mfg r Northboro
" Jean C (Sharon L) snagger O S Walker Co h16 Bourne
" John H (Beatrice) mgr of metallurgy WG r Oxford
" Kenneth C (Judith A) lab O S Walker Co h165 Perry
" Marjorie P clk Parker & Macpherson r3 Park Avenue pl
" Mildred (wid John H) r651-1 Chesterfield rd
" Milton A (Edna) mach opr Leland-Gifford h4 Holland
" Robt F (Janice) mach opr Wright Mach h4 Greenwood
" Stanley P tchr Leicester Jr College h3 Park Avenue pl
" Steph S (Jean) supvr Prov Mut Life Ins r Westboro
" Viola M Mrs slswn Grant's h27 Shelby
" Virginia H Mrs tchr Belmont Street Sch r Northboro
Hulnik Jane E bkpr F A Knowlton Inc r114 Endicott
" Mary A (wid Jos) h114 Endicott
Hult Ann M mgr United Food Management h33 Vernon
" Beda r5 Gorham
" Carl R (Mary A) driver M&M Trans h37 Jaques av
" Edw D (Dorothy) v-pres Lundquist Tool & Mfg r Auburn
" Enis C h1 Cedar apt 22
" Gertrude H (wid Philip S) ofc sec WPI h120 Lincoln
" Helen L comptometer opr N Co h6 Ralph av
" Helmer C (Agnes L) retd h16 Paul
" John R (Margaret M) prsmn N Co h46 Courtland
" M Joyce Mrs ofc wkr h21 Hillside
" Mary F typ Worc County Natl Bk r37 Jaques
" Ruth I r7 Ekman
" Sven H (Loretta) floorman Holmes Electrotype h11 Mt Pleasant
Hultberg Alice L (wid Richd R) supvr Fuller Regalia h4 Quincy
" Edw E engr Worc Engraving r Oxford
" Evald G engr Worc Engraving r Millbury
" Geo E (Janice) firefighter Fire Dept h1 Genoa
" Grace C nurse Hahnemann Hosp h138 Woodland apt 2
" Norman E engr WT&G r4 Quincy
" Sture A (Elin N) retd h20 Ericsson
Hulten Geo C (Anna L) ins appraiser S Carlisle h do
" Geo S (Janet S) mech N Co h65 Andover
" Geo S jr mldr N Co r65 Andover
" Janet S Mrs multilith opr Community Services of Greater Worc r65 Andover
Hultgren David R (Margt M) h16 Puritan av
" Edwin W (Hultgren Mfg) r Holden
" Godfred N (Linnea) clk North Worc Mkt h7 Oswald
" Helen Mrs slswn Harpers r Leicester
" Herman R (Victoria) wire drawer JS&W h872 Millbury
" Hugo C (Helen) wire drawer JS&W r Leicester
" Kenneth die mkr Hultgren Mfg r Holden
" Kenneth W floorman N Co r Millbury
" Lennart C (Virginia) trucker Heald h60 Esther
" Manufacturing Co (Edwin W Hultgren) tool mfrs 36 Whipple
" Otto J (Kate) retd h50 Chester
" S Ellen Mrs clk MPA r Millbury
" Sylvia M clk MPA r79 West
Hultin Gertrude L Mrs emp Astra r Holden
" Harold H sht mtl wkr N Co r Holden
" Ingrid V sten Riley Stoker r Holden
" Ronald W (Dorothy) bldg contr 11 Carlstad h do
" Roy W (Gertrude L) turret lathe opr Sleeper & Hartley r Holden
" Russell h37 Main
Hultman Elliot C eng Geo J Meyer Mfg r Leicester
" I Lillemor emp Astra r83 Bay State rd
" Irene R clnr Armstron Nursing Home r338 Granite
" Jos (Lena M) supvr WG h328 Granite
Hultquist Albert J (Pamela) mchn h39 Tower
" Augusta M (wid Carl O) h103 Greenwood

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HULTQUIST
" Edwin R (Ruth B) dept mgr Minute Precision Products h22 Great Brook Valley av apt 1
" Esther E mach opr US Envelope h15 Knight
" Everett A (Barbara) v-pres Ken Wild Co Inc r Holden
" Florence Mrs pkr Worc Felt Pad r Whitinsville
Humes John F (Eleanor) mtce Mass Steel Treating r N Grafton
" Marjorie L Mrs nurse Saul Lerner r12 Birch Hill rd
" Norman S (Marjorie L) supvr Heald h12 Birch Hill rd
" Richd H mach C&K r Upton
Humfryes Edw F (May G) auxiliary mn Mass Elec h16 Teddy rd
Humiston Everett L (Irene) emp Saltsky Alloys h12 Northampton
Hummel Albert F (Yetta E) mgr Mr B's Shoes h120 S Flagg
" Fredk G asst sls mgr Riley Stoker r Northboro
Humphrey see also Humphries
" Albert G formn Woodbury & Co r Brookfield
" Anna L hairdrsr Patio Beauty Salon r Northboro
" Cath M (wid Edw P) insulater H H Brown Shoe h5 New Vista la
" Chas E (Alice) emp WG (Grafton) h34 Hope av
" Cheryl J studt r80 Lakewood
" Clara embosser Frank H Pfeiffer Co r5 Beaver
" Donna J opr NET&T r53 Freeland
" Elena opr Albert J Rovezzi r Leicester
" Florence (wid Henry) r1016½ Main
" G Wm (Jesse G) slsmn Worc Baking h80 Lakewood
" Geo A jr (Hildur E) formn USS h28 Ivernia rd
" Geo A III studt r28 Ivernia rd
" Geo L (Mary A) lever mn WG h120 Laureldale rd
" Geo L jr studt r120 Laureldale rd
" Geo W (Jessie) slsmn Worc Baking r80 Lakewood
" Isabel retd r906a Main
" Jessie G Mrs biller Richard Healy Co r80 Lakewood
" John V (Rita) prntr h6 Ripley
" Judith G clk Melville Shoe r80 Lakewood
" Mary E stock clk Klothes Kennel r120 Laureldale rd
" Raymond W carrier PO r93 Downing
" Rita M Mrs supvr Security Accept r6 Ripley
" Scott D (Paula) drftsmn Worcester Valve r Auburn
" Scott D mach Geo Wright r12 Neptune rd
" Viola W (wid Chas) r14 Lexington
" Volney L (Marjorie E) methods eng Heald h12 Neptune rd
" Wm J (Mary E) formn John J Adams Co h53 Freeland
Humphreys Clara R embosser Frank H Pfeiffer Shoe h5 Beaver
" Grace H Mrs emp Astra r93 Downing
" Wm R (Grace) carrier PO h93 Downing
Humphries Chas (Anna C) drftsmn Rex Chain Belt h17 Douglas
" Geo J (Theresa E) mach Geo J Meyer Mfg h12 Sutton la
" Isabelle clk N Co r Cherry Valley
" Jas F (Shirley G) plant eng Rex Chain Belt h19 Wild Rose av
" Thos (Cath) retd h17 Douglas
Hung John H (Josephine L) studt r24 Richards
Hungerford Martha A slsmn Bancroft Yarns r Holden
Hunnewell David C pres Tailored Tools r Sharon

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EXHIBIT C.

PORNOGRAPHY, MAILING LISTS AND AMERICA'S CHILDREN

Testimony of Hon. Clement J. Zablocki of Wisconsin Before the Senate Judiciary Subcommittee to Investigate Juvenile Delinquency

Thursday, February 9, 1967

MR. ZABLOCKI: At the outset, Mr. Chairman, I wish to commend you and the members of your subcommittee for holding this series of hearings on a subject which has important implications for American society and which has in the past received insufficient attention and consideration.

While it is true that other Congressional inquiries have touched upon the links between mailing lists, pornography and our Nation's youngsters, your subcommittee investigation is the first to meet the problem squarely.

It is my sincere hope that because of these hearings, public and congressional opinion will be aroused to the point where needed, remedial legislation will be passed.

My remarks today, Mr. Chairman, will be directed toward the relationships between mailing lists, pornography and juveniles as I have come to see them after months of study.

It is my intention to cite specific, sometimes shocking, instances which have come to my attention. Finally, I will outline and recommend a legislative proposal designed to curtail the flow of mail order pornography to American children.

Mr. Chairman, mailing lists are big business and big money—for the most part legitimate. The business of compiling and renting out lists is estimated to have an annual dollar volume in the hundreds of millions. Further, mailing lists are the foundation stones on which the entire direct-mail industry is built. That industry now entails an estimated annual investment of $2.4 *billion*, an

amount equivalent to the advertising expenditures on television.

Because of the lucrative nature of the trade, a good deal of ingenuity and enterprise has been expended in gathering names and addresses for mailing lists. This subject was recently explored in an engrossing article entitled "You Can't Wear Out a List" by Calvin Trillin in the *New Yorker* Magazine of September 24, 1966.

Mr. Trillin describes how telephone books, magazine subscription lists, professional directories, bell captains and even the U.S. Census Bureau are used as sources for information.

In addition, mailing list brokers and compilers have refined these millions of names into highly specific categories according to age, income and occupational background.

For example, in reviewing mailing list catalogues in my possession, I have found that a list of 918 pedigreed swine breeders can be had for $57.50, a list of 27 deaf missionaries for $8.00 and the names of 24 zwieback manufacturers for $10.50.

You may be pleased to know, Mr. Chairman, that $10.50 also will buy a list of 84 doughnut bakers living in your home state of Connecticut. And that a Senator's name and address sells for about 15 cents, while a member of the House is only worth a nickel.

If one so desires, he can obtain a list of 212,000 attorneys, 99,000 dentists, and 259,000 doctors—all for about $25 per thousand.

Where do these names come from? One prime source is the professional associations to which these men belong. The American Medical Association, for example, allows several list complaines to use its nationwide roster of members in return for a royalty of $3.50 per thousand names on each rental.

This practice by the A.M.A. led to a most embarrassing situation for the organization two years ago.

Although it is not generally known, every active doctor in the United States received advertisements for *Eros* magazine, the Liaison Newsletter and the Housewife's Handbook on Selective Promiscuity—publications which

the United States Supreme Court decided were obscene in an important decision last year.

This is what Mr. Justice Brennan's majority decision had to say about the advertisements—the ads, not the materials themselves—which every American physician found in his mailbox:

"The 'leer of the sensualist' also permeates the advertising for the three publications. The circulars sent for *Eros* and Liaison stressed the sexual candor of the respective publications and openly boasted that the publishers would take full advantage of what they regarded as unrestricted license allowed by law in the expression of sex and sexual matters." End of quote.

The A.M.A. apparently found out that Ralph Ginzburg, who published *Eros* and the other material, had used their list only after a flood of complaints from doctors all over the country poured into the Post Office Department. Postal authorities rightly assuming that the *Eros* firm had got hold of the organization's master roster, alerted the A.M.A.

Somewhat red-faced, the A.M.A. was forced to send letters of apology to doctors after halting the further use of its list by Ginzburg.

That did not deter Ginzburg who now faces a prison sentence of five years and $28,000 in fines. On the envelopes of some of his later advertising circulars, he had printed: "The A.M.A. does not want you to open this envelope."

This incident graphically points up the fact that individuals and organizations who rent their lists often have no idea of how they ultimately will be used.

For Ginzburg, the A.M.A. list undoubtedly had a golden look since in the direct-mail industry doctors are considered to "perform well"—that is, they pay their bills and generally renew magazine subscriptions.

Despite the good reputation of doctors, Ginzburg might well have preferred to send his materials to youngsters. If he had, he could have bought the use of a list of one million boys and one million girls for $30 per thousand.

There is good reason why a list of youngsters should be worth $5 more per thousand than lists of doctors, law-

yers or dentists: children make choicer customers. They are easier prey.

Testifying before a subcommittee of the House Post Office and Civil Service Committee several years ago, Mr. Robert F. DeLay put it this way about mail order solicitations to children: "They are very responsive. They receive very little other mail."

The sources for the names of youngsters include mail order houses, publishers of books, magazines and comics, and advertisers in youth publications. These sources have no more—and probably less—knowledge of and control over who buys the names they compile than the A.M.A. did in the *Eros* case.

Spokesmen for the direct-mail industry are quick to insist that individuals and firms who deal in names of young pepole are careful to screen what is sent to those on their lists. Yet the mechanics of transactions in the industry are such that constant and adequate screening is very difficult and often "after-the-fact."

The Direct Mail Advertising Ass'n contends that its own code of conduct provides a safeguard against pornographic mailings or suggestive ads going to children. Yet of about 60 major list brokers in the nation, only 28 are currently listed as members of the DMAA. There are, in addition, many more small operators who compile, buy and sell lists. Alan Drey, president of a large list brokerage house, has admitted that "Anybody can be a list broker or sell a mailing list," in testimony before the House Post Office and Civil Service Committee.

Further, there even have been problems with DMAA members who presumably subscribe to the organization's "Operating Standards of Practice." Section 11 of that code states "Mailings will not contain vulgar, immoral, profane or offensive matter nor will members use the mails to promote the sale of gambling devices, pornographic material or other matter not acceptable for mailing on moral grounds."

That sounds tough, doesn't it? It seems less so, however, when one considers that Ralph Ginzburg, convicted obscenity peddler, was a member of the DMAA and osten-

sibly was operating under its code when he flooded the U.S. mails with his ads for *Eros*.

The DMAA, in testimony before the House Post Office and Civil Service Committee has pointed with pride to its investigation of Ginzburg by an ethics committee prior to his federal conviction. Given less emphasis is the fact that Ginzburg was not *expelled* from DMAA but rather he was asked and *resigned* voluntarily.

In explaining how such a man could join the organization in the first place, a DMAA bulletin to members admitted that, "We have no way of knowing what a company is intending to mail when they apply for membership."

Another case has been brought to my attention by Mr. George Berdes, who as editor-director of the Marquette University Press in Milwaukee, turned over to me a copy of a brochure for a number of—quote—"sex-minded lists" —unquote—which he had received from Ed Burnett, Inc., of New York. Mr. Berdes, who is now my administrative assistant, also gave me an exchange of letters which he subsequently had with Mr. Burnett on the subject.

With your permission, Mr. Chairman, I would like to include in the Record at this point a copy of this list broker's ad and the correspondence.

* * * *

In reply to Mr. Berdes' objections, Mr. Burnett openly admitted he was selling sex and implied that such activities are justified because everyone is "sex minded." With such an attitude one wonders how carefully this list broker screens his lists to prevent young people from receiving unsolicited mail-order ads for sexually stimulating materials.

I had occasion to discuss this situation with Mr. DeLay, President of the DMAA. He admitted that Mr. Burnett was a member of his organization and that the two had discussed the propriety of Mr. Burnett's operation without coming to an agreement.

Yet Mr. DeLay did not indicate at that time that the ethics committee of his organization was investigating Mr. Burnett. Nor have I received any information since,

that would indicate that this broker has been expelled or asked to resign from the D.M.A.A.

My purpose here is not to denigrate or criticize the D.M.A.A., which undoubtedly does much for its members, but rather to point up two realities which are exemplified in the case I have cited:

First, because sex sells—and apparently sells very well—there will be brokers who will provide the mailing lists, lists which may well contain the names of young boys and girls.

Second, voluntary codes of ethics by business associations in the direct-mail field are largely ineffective in restraining those who wish to traffic in offensive materials.

At this point, let us lay rest to the contention of the smut peddlers that they do not intend their wares for children, but only for mature adults. In many of the "come on" ads, they send a notification that the materials are "for adults only" or the suggestion to "disregard if you are not 21."

These disclaimers are nothing but hedges against potential criticism. Their principal effect probably is to entice youngsters into thinking that they are being "grown up" by sending for the smutty pictures or literature.

The Post Office Department estimates that more than one million boys and girls in 1966 received unsolicited in the mails either pornography or ads for such materials. It is impossible to believe that all these mailings were only accidentally sent to young people.

In many cases, the smut merchants are interested in directly involving youngsters in their dirty game. In his series for the *Washington News* on this subject, Newsman Samuel Stafford told the story of a young boy right here in Washington, D.C., who answered an unsolicited ad, was "hooked," and ultimately blackmailed by the smut racketeers into selling pornography to his schoolmates.

When postal authorities finally caught up with the boy they found hidden under his bed some of the most obscene materials they had ever seen.

Along that same line was a case which occurred in my home state of Wisconsin because of the activities of Mrs.

R. V. Anderson, legislative chairman of the Federation of Women's Clubs, in investigating the nether world of pornography.

Through an ad in a magazine which Mrs. Anderson purchased in a grocery store, she learned of the publication called "Rogy's Personals." This sheet is—or rather was—a "pen pal" service for people seeking companionship with other people, often homosexuals or lesbians.

After consulting postal authorities, Mrs. Anderson, using the name of her 5-year old grandson, sent in an ad. She received dozens of replies, 13 from Wisconsin. All the letters were turned over to the postal authorities for investigation. As a result, two men were arrested and one federal employee lost his job.

The most disturbing thing about "Rogy's" and other such dealers is their unabashed interest in twisting the minds of young people in order to recruit them to perversion. Some of their books, for example, describe how to make a homosexual out of a normal person.

And a typical ad in Rogy's personals reads: "White male wants to meet and correspond with good looking teenage boys and boy movie stars . . . . . Will do anything you desire. Guarantee you a good time."

Since the Supreme Court decision in the *Mishkin* case, "Rogy"—Oscar Roganson—has been arrested and charged with three counts of possession, distribution and sale of obscene literature.

When Roganson was arrested, police seized index cards with the names and addresses of 6,000 "clients" from throughout the United States. There is evidence that Rogy regularly sold his roster of names to other smut peddlers.

* * * *

Mr. Chairman, from the incidents and statistics which I have related one thing, above all, becomes clear:

Our children become fair game for the smut-peddlers by the time they are old enough to write a letter, lick a stamp and reach the mail box.

No matter what they may send away for, there is a good chance their names may become a saleable commod-

ity, available to anyone, regardless of how tawdry may be his intentions and his wares.

The serious condition which this practice is causing in our Nation is clear. The complaints by parents to the Post Office Department have increased tremendously over the past several years.

A remedy must be found. In that belief I began a study of the problem early in 1964.

It became clear that any new federal legislation should be directed at the buying and selling of mailing lists. This is, so to speak, the bottleneck of a complicated and far-flung industry. A little prevention here might eliminate the need for more drastic remedies elsewhere.

On April 28, 1964, I first announced my intentions of introducing legislation to regulate and review mailing list transactions and mailing list brokers. A story appeared in the daily press and elicited a gratifying response from interested persons around the country.

I was particularly pleased by the reaction of the direct mail advertisers themselves. For example, the *Washington Newsletter* of the Direct Mail Advertising Association reported that many members of the Association volunteered that they would be quite willing to discuss in Washington my approach to the problem of mail-order pornography. *The Mail Marketing Newsletter*, another respected publication of the trade, gave its qualified endorsement to my proposal. In its July, 1964, issue the newsletter said:

> Although we have not seen the legislation, we believe that Representative Zablocki may have hit upon a practical means of discovering mailings that violate existing law prohibiting the mailing of pornographic material. There are literally thousands of small printers and letter-shops whose activities are impossible to keep under surveillance, but there are relatively few firms in the list business. No mailing can take place without a list, and therefore providing for inspection at the point where sale or exchange of lists takes place offers the most practical means of eliminating pornographic mailings.
>
> We believe Representative Zablocki's proposal offers more protection with less danger of damaging

legitimate advertisers than Representative Cunningham's (R.-Nebr.) approach which would permit the recipient to decide whether an individual mailing was "morally offensive" and to request that his name be removed from the mailer's list . . .

On January 18, 1965, I introduced my bill into the 89th Congress. The reception of the public and the direct mail industry was heartening. In February of that year I met with representatives of the direct mailers. They too have been concerned with the rising tide of smut being sent through the mails.

One of their chief concerns was that my bill, as written, did not cover persons who make lists from their own sources and use them to send pornography. At that meeting I agreed that the bill could be strengthened by including such persons and agreed to amend my bill in this regard.

The Post Office Department has also been favorable to this proposal. In early July I met with Postmaster General John Gronouski, Chief Postal Inspector Henry Montague, and Department Counsel Felix Sklagen to discuss the matter.

I found them very concerned about the problem. They informed me that the number of complaints from parents about this material being received in their homes had increased almost 300 percent in the past three years. Although the postal authorities have stepped up efforts at finding and having convicted these traffickers in filth, it appears that new effective legislation is needed.

The former Postmaster General endorsed the concept embodied in my bill and, together with experts on his staff, offered suggestions for improving and strengthening the measure. These were gratefully received.

Incorporating as it does the suggestions of concerned industry representatives and postal experts, the revised and amended version which I have introduced into the 90th Congress is, in my estimation, greatly strengthened and improved. It is H.R. 2382, which currently is pending before the House Post Office and Civil Service Committee. A similar proposal has been introduced in the Senate by the distinguished gentleman from Indiana, Mr. Bayh.

With your permission, Mr. Chairman, I would like to include at this point the text of the bill.

* * * *

The effects of this measure principally would be three:

First, it would provide the Post Office Department authorities with considerably more information about an industry which the Post Office has admitted having limited knowledge and information.

Second, it would assist officials in gaining information which would be useful in obtaining convictions under existing obscenity laws.

Third, the bill very likely would have an inhibiting effect on the smut peddlers. They would fear to keep the required records and yet if they failed to do so they could be liable for prosecution under the act itself.

I would also like to emphasize what my bill would *not* do:

First, it would not impose any kind of censorship. It does not call for determinations of what is offensive or obscene. It merely seeks to give to responsible authorities more information on the traffic in lists of addressees.

Second, the bill would not interfere with the operation of legitimate mailing list suppliers and buyers. Many of these conform to codes of ethics in their trade, and are careful about what kinds of materials are distributed to persons whose names are on their lists. The records which the firms would be required to keep under the bill are no different than those a business ordinarily has readily at hand.

Third, the bill would not eliminate mail-order pornography overnight, if enacted. It would require vigorous enforcement by the Post Office Department to stop irregularities in the transfer of mailing lists in order to shut the smut-peddlers off from their customary sources of names of potential customers. Prosecutions and other actions under already existing anti-obscenity laws would have to be continued in order to attack the mail order pornography problem on a broad front.

Mr. Chairman, the work being done by your subcommittee dramatically highlights the current problem in mail order smut and the need for an effective solution.

You are making it clear that the time has come for Congress to act to protect our most precious heritage—our young people—from being corrupted and perverted by those malefactors whose greed and baseness causes them to spread the lewd and lascivious, the salacious and the obscene, to every corner of our nation. It behooves us to act with dispatch. With each passing day more and more young people are faced with temptation which comes to them in the mail; more and more are touched by this corruption; more and more, I regret to say, fall into the hands of the smut-peddlers.

In a very real sense, Mr. Chairman, the possibility of attaining the Great Society depends on this issue. It will never be achieved if our citizenry is riddled with perversion and erotic self-indulgence. Our goal can only be attained if Americans are self-disciplined and sustained by principles of morality and justice. Let us, therefore, determine that the 90th Congress will not adjourn without having taken effective action to clear this pollution from our postal system.

* * * *

H.R. 2382

A bill to require mailing list brokers to register with the Postmaster General, and suppliers and buyers of mailing lists to furnish information to the Postmaster General with respect to their identity and transactions involving the sale or exchange of mailing lists, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That (a) chapter 53 of title 39, United States Code, relating to the several classes of mail, is amended by adding at the end thereof the following new section:

"4061. Registration of mailing list brokers; furnishing of information by suppliers, buyers, and users of mailing lists

"(a) Each broker engaged in the sale or exchange of mailing lists for profit shall register with the Postmaster General, within . . . . . days of enactment, a registra-

tion statement in such form and detail as the Postmaster General shall determine, respecting (1) the name under which he is or intends to do business, (2) the scope and general character of the business transacted or to be transacted, (3) the relationship, if any, of the mailing list operation with other business undertakings, (4) the location of his principal business office, and (5) the names and addresses of the directors and the chief executive officers where the broker is a corporation, association, partnership, or other such entity;

"(b) Each individual and each corporation, partnership, or other business organization or association using, buying, selling, leasing, renting, exchanging, or otherwise making available to others for profit any list of addresses or other similar mailing list shall on request furnish the Postmaster General, in such form and detail and at such time as he shall determine, information respecting (1) the name of the individual, corporation, partnership, or other business association or organization, and (2) the identity of individuals having a financial interest in any such organization or association, including the responsible officers and employees thereof. Records shall be kept for a period of not less than five years and postal officials upon request shall be permitted to examine such records and particulars of transactions or mailings pertaining to any such address or mailing list;

"(c) As used in this section—

"'broker' means any person who engages either for all or part of his time, directly or indirectly, as agent, dealer, or principal in the business of offering, buying, selling, or otherwise dealing or trading in mailing lists owned, rented, or used by another person;

"'registration statement' means the statement provided for in this section, and includes any amendment thereto and any report, document, or memorandum filed as part of such statement or incorporated therein by reference;

"'supplier' shall mean to include broker, owner, and compiler'

"'buyer' shall mean any person who buys mailing lists or buys the use of such lists through leasing or renting agreements;

"'user' shall mean any person who uses mailing lists supplied by someone else, or the person performing the acts and assuming the duties of handling, compiling, sending by mail or by messenger list of names to be used for his own benefit, or the benefit of another, for profit;

"(d) The Postmaster General shall make appropriate rules and regulations to carry out the purposes of this section.".

(b) The table of contents of such chapter 53 is amended by inserting:

"4061. Registration of mailing list brokers; furnishing of information by suppliers, buyers, and users of mailing lists."

immediately below

"4060. Foreign publications free from customs duty."

Sec. 2. (a) Chapter 83 of title 18, United States Code, relating to offenses against the postal service, is amended by adding at the end thereof the following new section:

"1735. Mailing list brokers, suppliers, buyers, and users

"whoever, being required by section 4061 of title 39, United States Code to furnish information to the Postmaster General, fails or refuses to furnish such information as the Postmaster General shall request under such section, shall be fined not more then $5,000 or imprisoned not to exceed one year, or both."

(b) The table of contents of such chapter 83 is amended by inserting

"1735. Mailing list brokers, suppliers, buyers, and users."

immediately below

"1734. Editorials and other matter as 'advertisements'."

Sec. 3. The foregoing provisions of this Act shall become effective on the day following the date of enactment of this Act.

EXHIBIT D.

ONWARD AND UPWARD WITH THE ARTS
YOU CAN'T WEAR OUT A LIST

"There's a certain cachet in getting mail," Harry Maginnis, the president of the Associated Third Class Mail Users, has said. "If you don't get any mail, you're probably a credit risk and uneducated. A deadbeat. A bum. A guy who doesn't get any mail, watch out for him." Anyone who does get mail, on the other hand, probably has a name that is considered valuable enough to be rented out, or valuable enough to be traded for an equally treasured name. He has been included in a marketable mailing list. Anyone doubting Maginnis's Law need only read through some of the descriptions of lists that are distributed to potential customers by list brokers, or glance through the advertisements that sometimes appear in a trade magazine called the *Reporter of Direct Mail Advertising;* the man they depict is in no danger of being categorized as a bum. His financial status is attested to every time his name is rented out, for two and a half cents, as an American Express credit-card holder ("88% earn over $10,000 a year") or, for three cents, as a key-holder in Playboy Clubs International ("All paid $25.00 to $50.00 for membership and are credit rated and in above average income levels"). His willingness to travel may be certified by his name's having been rented out, for two cents, as a former guest at a Schine Hotel ("High-income traveller and resort vacationist") or, also for two cents, as a former subscriber to *Commentary* ("70% travelled abroad in past five years, 20% visited Israel, 95.3% travel fifty miles or more a year") or, for about a penny and a half, as a person who has had some correspondence with the Florida Chamber of Commerce ("Men and women who wrote to the Florida Chamber of Commerce for information on where to spend vacations or where to retire in Florida"). He has probably been stamped as a participant in the cultural explosion; he may have been rented out, for two and a half cents, as a donor to the Musicians' Aid Society

("Particularly interested in cultural appeals") or, for one and three-quarters cents, as a former subscriber to the *Reporter* ("Active, cultured individuals") or a customer of Brentano's ("Cultured well-to-do individuals") or, for three cents, as a current subscriber to the *Partisan Review* ("Heavy readers"). A recipient of third-class mail may have been dashing enough to have had his name rented out by Bachelor Party Tours ("The emphasis is on fun, and most of these travellers are single"), or prudent enough to have been rented out as a former policyholder with National Liberty Life Insurance ("Non-drinkers' health-and-accident insurance policy at a preferred rate"). Even if someone receives mail only because he is in the phone book, it speaks well for him. The O. E. McIntyre company, which compiles lists from phone books, notes in its catalogue that "telephone owners have more than twice the income of non-telephone owners." In other words, anyone whose name has been rented out by the owner of each of these lists may think that he has merely received a dozen offers from record clubs and magazines and credit-card companies, but what he has really been sent is certification that he is a wealthy, cultured, dashing, prudent, credit-checked American. And the people who have provided him with that certification have made only about twenty-five cents from his name.

The mailing-list business is a concentrate of American free enterprise. No one tries harder than a mailing-list broker to emulate the Midwestern meat-packer who managed to sell everything but the squeal. No other businessman is so horrified by the sight of a potential source of profit lying fallow. A broker or a compiler of mailing lists is often haunted by this sense of waste, because he can see a potential source of profit where others see only a list of names. And he can see a list of names where others see only a method of licensing automobiles or delivering magazines or giving away free recipe booklets. In the eyes of someone in the list business, no transaction is quite what it appears to be to the less advanced practitioner of free enterprise; it is what it appears to be plus a list. A mailing-list broker assumes that people who have enough in common to be on the same list have enough in common

to constitute an excellent market for some product, and he is likely to feel professionally unfulfilled until he figures out what the product is. Arthur Martin Karl, of Names Unlimited, a veteran list broker, has even managed to find a use for the No List. The No List is the result of a phenomenally successful direct-mail technique pioneered by the *Reader's Digest* and known as a sweepstakes. The recipient of a sweepstakes mailing can send in a reply card that makes him eligible to win one of a million dollars' or so worth of prizes offered in the sweepstakes drawing and, at the same time, carries his order for whatever merchandise is being sold. He can also say no—that he would not like to buy the merchandise but would just as soon have his reply-card number remain in the sweepstakes anyway. The No option prevents the sweepstakes from being an illegal lottery that requires a purchase as the price of entry; also, as it happens, the inclusion of the No option always increases the number of people who say yes—even when no sweepstakes is involved and the person who sends in a No card has nothing whatever to gain. Some merchants might consider this double blessing enough to justify the existence of the No option; a list broker would look upon such merchants as people who are willing to tolerate unconscionable waste. The returned Nos are a list, and a list that is not being rented out is a by-product wasted. But who could use a No List? It is true that the people on it demonstrated some activity by taking the trouble to mail in the reply card—and activity of any sort is highly valued in the list business—but the only other characteristic they had in common was a willingness to walk to the mailbox in order to take a chance on winning something for nothing. Karl eventually thought of the Puzzle Lovers Club, an organization whose members receive cash prizes for solving puzzles published in the *Puzzle Lovers Newspaper*. The Puzzle Lovers Club was willing to send a test mailing to three thousand names on one of the No Lists that Karl offered. The percentage of response was so high that the club ordered twenty-five thousand more No List names, and then five hundred thousand more.

Anyone who spends much time among list brokers eventually begins to suspect that a list broker can find a use for any list. The suspicion grows that if somebody defied Maginnis's Law and wrote in to demand that his name be taken off a list, he would be placed on a list of people who have demanded that their names be taken off lists.

"No, there's no use for that one," a list broker told a visitor recently.

"How about renting it out as a soreheads list?" the visitor asked. "It might do for selling products to people who want to be left alone—ammonia to squirt in dogs' eyes, or electrified fences, maybe."

The list broker smiled and shook his head, and made a note on his desk pad.

People in the list business find it natural to turn a dollar on what less resourceful people would probably not recognize as a marketable commodity. The O. E. McIntyre company, for instance, which has annual sales of several million dollars, has built its entire business on the names in phone books and statistical information available to anybody from the United States Bureau of the Census. Bernard Fixler, of Creative Mailing Service—a Long Island company that specializes in compiling business and executive lists—has said, "We have forty-three hundred telephone books and Dun & Bradstreet, and for the main part of our business that's all we need." List compilers often take the trouble to copy down what is available to everybody anyway. Then they sell it. They go to Washington to copy down the names of contributors to campaign funds, which both parties are required to disclose after each Presidential campaign, or they copy down the names of the people in the New York telephone directory who have more than one telephone number. It is common for a list compiler to sell the names of the members of a professional society merely by making the society roster into a list.

List brokers, possessing the optimism of the truly enterprising, are only briefly distressed if a list of marketable names seems unavailable; often they can simply hunt around and turn up a list that contains the same names. Financial-advisory services are not permitted to advertise in the *Wall Street Journal* and cannot rent the list of cur-

rent *Journal* subscribers. (The *Journal* does, however, trade the names of former subscribers, known in the business as "expires," with other publications.) However, a financial-advisory service *can* rent a list like "Mail Order Buyers from *Wall Street Journal*," which is composed of people who have purchased sports equipment and other merchandise from a company named Scott-Mitchell by answering its advertisements in the *Wall Street Journal*. Scott-Mitchell customers make up only a small percentage of the *Journal's* readership, of course, but they have demonstrated that in addition to being people who read the paper they are people who are willing to buy through the mail—the sort of activity most highly valued in the list business. If a list broker cannot find an alternate list, a list compiler can always create one. Not long ago, Herbert Odza, the chairman of the Dunhill International List Company and one of the industry's most aggressive compilers, happened to mention to a reporter a list of contributors to the United Jewish Appeal.

"But I just spoke to the U.J.A. yesterday," the reporter said. "They told me they don't rent their list to anyone. They don't even trade it."

"That's right," Odza said.

"Then how did you get it?"

Odza looked disappointed, as if he found it distressing that anyone could fail to see such an obvious bit of business strategy. Eventually, he said, "Well, the U.J.A. has dinners attended by the big contributors, right?"

"So you subscribe to the Jewish press, and if it covers the dinner you get some of the names."

Odza smiled patiently and shook his head. "There are only twelve hundred hotels with banquet halls used for that kind of dinner. They all print programs for the dinner, and the bell captain gets a copy of the program, right?"

"Right."

"Well, we have arrangements with nine hundred of the twelve hundred bell captains. Then we add to that information whatever is in the U.J.A. newsletter, and we subscribe to all the papers. We put together a list of eighteen thousand of the largest contributors. Of course, we don't sell it as the U.J.A. list. We call it 'Large Contributors to a Jewish Charity' or something."

The list business easily meets the most important test of free enterprise: the profit margin is enormous, and business is booming. According to list brokers, companies can make so much money renting out lists of their customers that some mail-order firms are willing to break even on their merchandise and make their profits from the rent brought in by their lists. People in the trade estimate that the Diners' Club, which now has a list of about a million names, makes about five hundred thousand dollars a year —almost pure profit—from renting it out; an executive vice-president of the Diners' Club acknowledges that the figure is "in the hundreds of thousands." The actual business of compiling and renting out lists is estimated to have an annual dollar volume in the hundreds of millions, and it forms the basis of the entire direct-mail industry, which now draws about as much advertising expenditure as television. In the forties, mailers invested some two hundred and fifty million dollars a year in production costs and postage for direct mail; in 1965 the figure was two billion four hundred and eight million. The volume of third-class mail has gone from roughly four billion pieces a year in the forties to roughly twenty billion pieces last year. About fifteen billion pieces of that were bulk-rate third-class mail—and every one of those fifteen billion pieces owed its existence to a list.

As purists in free enterprise, list brokers often have to help along the ordinary American businessman who, probably through ignorance rather than any desire to slow up the economy, may be neglecting an immensely marketable by-product of his business. In the writings and conversation of list brokers, a scenario of enlightenment emerges:

"The walls are coming down," an advertisement for Lewis Kleid, one of the leading list brokers, declares. "Big national companies are rapidly recognizing the income potential from the rental (not sale) of consumer-list properties. This includes: coupons from space advertising, warranty registrations, premium buyers, contest entrants, product inquiry, and customer names."

"But I can't go around renting out my own customers," says the Unenlightened One.

"Some mailers . . . . don't want to subject 'their' customers to a lot of extra mail," says a direct-mail newsletter called *Briefs from Bringe.* "There is a feeling that rental would be 'breaking faith' with the customer. The assumption is that the mailer can control the mail his customer receives, and even that he has some right or duty to do so. It overlooks the fact that the customer receives mail from many sources, wants to get such mail, and has not given anyone the authority to decide what he should or should not receive."

"I'd be crazy to give out the names of my customers to somebody else."

"You wouldn't be giving out anything," say the brokers. "You would rent out the names on a one-use basis; either the renter sends his envelopes to you for addressing or you send him labels. The only names of yours he has when it's over are the ones who have responded to his mailing piece, and that's probably only two or three per cent. You wouldn't rent out to competitors."

"How about all that smut-through-the-mails I'm always reading about?"

"The renter will submit his mailing piece to you for approval, and if you don't approve, or if you want to use the list yourself that week, you don't have to rent it out."

"It just occurred to me that even someone with an inoffensive mailing piece could copy the names off the labels I send him and use them forever, the thief."

"Never. In the first place, there is a great deal of trust in this business. In the second place, you can require a guarantee in the contract that this won't happen. In the third place, anyone who rents out his list keeps dummy names on it, so that anyone who is tempted to steal it knows that he is about to send one of his mailing pieces to a misspelled aunt or a peculiarly initialled secretary of his victim, who will have him ostracized."

"Sending my customers all those other offers is obviously going to cut down what they buy from me."

"List owners have a tendency to overprotect their names and to resist frequent usage," Lewis Kleid has written. "Mail-order experts contend, however, that you can't wear out a list. If anything, frequent mailings help condition and improve the quality of the names."

The most irresistible argument that a businessman can hear from a list broker concerns profit. The profit margin in list renting is what might be expected of a business that takes free enterprise seriously. Anyone who has a list of reasonably desirable names can usually rent it out for something like twenty dollars for every thousand names. That amounts to ten thousand dollars for a list of five hundred thousand names, and, except for a broker's fee of twenty per cent and expenses of two or three dollars per thousand for addressing, it is pure profit. "The company which fails to seek revenue from its names is doing its profit picture an injustice," the Kleid advertisement says. "For a company which nets ten per cent, a hundred thousand dollars in list-rental income is equivalent to a million dollars in sales (the hard way)."

Some firms are so anxious to avoid doing their profit picture an injustice that they market the names of their customers with almost as much energy as they devote to merchandising their principal product. At a congressional hearing in 1963, the direct-mail manager of McGraw-Hill testified that his company had two hundred and ten lists available for rental. Until recently, McGraw-Hill published a catalogue just of its own lists. The list manager of Doubleday estimates that his firm has thirteen million names available for rental. Sunset House, a California company that sells a variety of merchandise through the mail, now publishes its own brochure describing the various ways in which its three and a half million buyers can be sliced up to meet the renter's specifications. Anyone renting Sunset House customers can select them by geographical regions or states, and can rent only the names of people who live in large cities, or only the names of people who do not. The renter can select the names of people who bought something from Sunset House after seeing an advertisement in a newspaper or magazine, or of people who responded to a mail-order catalogue. He can rent the names of people who have made more than one purchase, or of people who have purchased recently. ("Fresh" names are prized among its users.) The Sunset House list can be sliced up in so many ways that Arthur Karl—who, like most list brokers, keeps a dummy name on many lists in

order to follow the movement in the trade—has to maintain six buyers of Sunset House merchandise across the country just to keep track. Anticipating some of the suspicions that mailers harbor about any list they are about to rent, the Sunset House brochure even includes a statement from an independent auditor that the size and description of the list have been fairly stated, and a guarantee from Sunset House that the list is "cleaned" five times a year. (Because about twenty per cent of the population moves every year, a list will soon include many names with wrong addresses—known in the trade as "nixies"—unless these names are cleaned off regularly. Undeliverable third-class mail is ordinarly thrown away by the post office, so in order to clean a list the mailer has to place a "Return Requested" notice on the envelopes of a mailing—guaranteeing the post office that he will pay an eight-cent fee for every piece that is returned—and then remove the nixies from the list.)

Many corporations have always sent mailings to their own lists—magazine publishers like Time, Inc., and the *Reader's Digest* have found that their lists constitute ready-made markets for expansion into book publishing and record selling—and, to some extent, the Lewis Kleid advertisement is correct in stating that the walls against renting out customers to other companies are coming down. "Data cards"—the five-by-eight cards that brokers circulate on each list they are offering—now exist for such respectable organizations as the Harvard University Press, the Polaroid Corporation (customers who have returned warranties), the New School of Social Research, Mutual of Omaha (purchasers of air-travel insurance), and the Modern Language Association of America. Still, there is a reluctance on the part of some list owners to rent out their lists on the open market, and a good deal of business is carried on through informal agreements that do not involve brokers. Some firms that do deal through brokers prefer to rent out their lists anonymously, the result being data cards on lists such as "Donors to a Liberal Cause" ("Liberal and mostly intellectual individuals who believe in civil rights"), or "Subscribers to Stock Brokerage House Newsletter," or "Buyers of an Item Used in the Graduation

Ceremony" ("The character of the purchase immediately preselects this group as being among the graduates of the better Catholic, private, and public grade and junior high schools"). Large corporations that have made a business of renting out their lists often seem to find some way in which they are not in the business—some aspect of list renting that they would never indulge in. "We don't have salesmen selling our list, the way American Express does," says Matty Simmons, an executive vice-president of the Diners' Club.

"We don't pay brokers a brokerage fee for renting out our list, the way the Diners' Club does," says the man at American Express who is in charge of finding renters for the credit-card list. "We really do this more as a service to our customers. We're really not in the list business, the way somebody like Dun & Bradstreet is."

"We are not in the list business," says George Paul, a public-relations man at Dun & Bradstreet. "Get that out of your mind."

(The Diners' Club list is rented out through brokers. American Express is one of the new firms that do not pay brokers' fees, but, unlike the Diners' Club, it merchandises its own list vigorously through salesmen and advertisements in the *Reporter of Direct Mail Advertising*. Dun & Bradstreet has been in what everybody else considers the list business since 1964—it employs list salesmen and publishes a catalogue of its lists—but its public-relations department does not like to use the term.)

Arthur Martin Karl has said, "An individual act always indicates a predisposition to perform a related act." People who have asked for a TWA travel booklet, or have sent in money to pay for the minature license plates they received from the Disabled American Veterans, or have opened charge accounts at Peck & Peck have, in the eyes of a list broker, held up their hands and challenged him to find an act that is related. Some connections are, of course, obvious. Anyone who wants to sell a food item through the mail is likely to be offered such lists as S. S. Pierce customers, former subscribers to *Gourmet*, mail-order customers of the Wisconsin Cheesemakers' Guild,

members of the Society of Gourmets, and buyers of any one of a dozen cookbooks. A firm selling automobile accessories can choose among fifty or sixty lists in the Auto Classification provided by Jack Oldstein, of Dependable Mailing Lists—from forty thousand people who have purchased a battery additive from the Campbell-Smith company to fifty-one thousand who are members of the Automobile Club of Washington. Anyone who wants to sell a book that happens to deal in some way with sex may try to rent the list of people who have bought "The Ravishers" and other books from Ignis Company and Marital Publications ("Sex Book Buyers"), or those who have bought one or another of Albert Ellis's books from Lyle Stuart, Inc. ("Dr. Albert Ellis' Sex Book Buyers"), or those who have bought books from Grove Press ("Most of the classics, including the writings of controversial authose such as D. H. Lawrence, Henry Miller, and others").

Although a list is created or enlarged every time a list is used—the names of the people who respond to the mailing become the property of the list renter—a heavy mailer can soon run out of names in the obvious categories and must then start looking for connections further afield. Sometimes the connection is only one step away. In selling self-help books, Doubleday does well with a list of people who have pruchased rapid-reading kits from the Better Reading Program—people who presumably want to help themselves and also need books in order to utilize their improved reading skills. The "list universe" of the Puzzle Lovers Club—that is, all the lists that regularly unearth a profitable percentage of puzzle lovers—includes not only the No List but almost any list having to do with astrology. Books on birds have been successfully sold to a list of people who have purchased binoculars by mail—a list that itself may have been built partly from the replies to a binocular offer mailed to people who had purchased books on birds. A *Wall Street Journal* circulation specialist has been quoted as saying that the list of subscribers to *Playboy* was the best list the *Journal* ever used. Mailers are constantly testing lists—mailing to a few thousand names on each one and keying the reply cards to measure results—and anyone who is willing to experiment can

occasionally stumble onto connections that would not have appeared so obvious before they were demonstrated. Boyce Morgan, the director of sales for the Kiplinger company, has said, "In the forties, we were using mostly investment lists for our Washington newsletter. Then I tried some crazy testing of other lists. One of them was people who had a bought Klipette, a device to remove superfluous hair from the nose. It was a dilly. Why did it work? Well, first, people of an age to have hair in their nose and ears might be the ones we were looking for, and then it does show a certain fastidiousness. In a way, it was a back-door look into the executive suite."

The best list that has ever been used by the Republican National Committee is, not surprisingly, a Doubleday list of people who purchased "Six Crises," by Richard M. Nixon. Unfortunately for the Republicans, the list contains only about fifteen thousand names. The Republicans have had good results with expensive-gift lists, but their most remarkable success was with the Kozak Drywash list—advertised by Kozak as a list of half a million "upper-income men and women who buy Kozak Drywash Cloths by mail to keep their expensive cars spotlessly clean every day the sun shines." According to the Kozak company, the National Committee found Drywash customers so responsive that it rented the list twice during the 1964 campaign. This might be precisely the Democrats' image of a Republican—a miserly old man standing in front of his two-car garage scrubbing down his expensive car, too stiff to get himself a bit wet while doing it—but the Kozak company says that there are more Democrats on the list than Republicans, that the list has worked for American Heritage books as well as for the *Wall Street Journal*, and that it would work just as well for the Democratic National Committee if the Democrats would only try it. But Guy Yolton, the direct-mail consultant who has been advising the Republicans, says, "There definitely is a connection. People who take care of their things tend to be the type of conservatives who lean toward the Republican Party. We're now trying another cleaning-rag list, and also a list of people who bought plastic garages to cover their cars. Maybe people who buy burglar alarms would

be good, if we can find a list of them, or automatic sprinkler systems, or home fire extinguishers."

There is always disagreement in the list business about what kind of lists work best for what kind of products—partly because there are always other variables, such as the cleanliness of the list, the attractiveness of the mailing piece, and the price of the items offered. A layman wandering through the list business is often tempted to make some leaps of amateur psychology. Recently, while talking to a visitor, Karl Brussel, who sells books—usually about sex—through the mails, was leafing through the lists he had used for selling "An ABZ of Love." He noted that a list of people who bought automobile accessories had worked very well. Then he turned a few more pages in his scrapbook and found that he had also had great success with purchasers of night-driving glasses.

"You should try purchasers of hood ornaments and you'll hit the packpot," his visitor said.

"No, I don't think it would make much difference," said Brussel. "Sometimes I think I could toss all the cards up in the air and use the ones on top to sell my books. This is a lonely, fractured society, and people are reaching out." Brussel was also successful in selling "An ABZ of Love" to a list of Vermont ski enthusiasts and to alumni of the Harvard Business School.

Some lists are so responsive that an offer in a completely unconnected field is likely to draw a response from a profitable percentage of the names—a profitable percentage in the direct-mail business being perhaps as low as two or three per cent, depending on the product and its price. The subscription list of *Eros*, now cleaned down to a hundred and ten thousand names, rents for thirty-five dollars a thousand and is so effective at selling expensive merchandise that anyone who wants to rent it must wait his turn. The name most often mentioned by brokers when the subject of "hot lists" comes up is Ambassador Leather Goods, one of the free-enterprise success stories of the list business. Only about five years ago, a couple in Niagara Falls, Mr. and Mrs. Murray Hall, first offered by mail a walletlike item called the Continental, which had windows for twelve credit cards, a money slit that could easily

accommodate the small amount of cash that anybody with that many credit cards was likely to carry, and free "personalization" (initials) in "14kt. raised gold-plate." The Continental was an immediate success. The Halls—using rented lists and the steadily increasing list of their own customers—went on to develop a full line of wallets and other leather goods. At the same time, they developed a list of five hundred thousand customers who are likely to buy anything offered them—from clothing to magazine subscriptions. One list broker said recently that anything that cannot be sold to the Ambassador Leather Goods list or to the subscription list of a health magazine called *Prevention* ("Mature, intelligent men and women seeking a constructive personal health program") cannot be sold through the mail.

Many list brokers believe that the most significant bond that holds together the people on a mail-order list is not the particular product they bought but the fact that they bought it by mail. The mail habit is considered important enough to have a value in the market. The Curtis Publishing Company, for instance, one of the relatively few large magazine publishers that rent out lists of current subscribers, gets five dollars per thousand more for subscribers who ordered through the mail than for subscribers who ordered through news agents. There is little argument in the list business that a list of mail-order customers is more responsive than a list reflecting any other common activity. However, the rest of the population is not forgotten; it is compiled. People on compiled lists have preselected themselves as lawyers or mothers or boat owners or plant managers or phone users or high-school seniors without having had to go near a mailbox. There are times, of course, when a compiled list works better than a mail-order list, and other times when mailers prefer to know more about their potential customers than a mail-order list can tell them. Magazines, for instance, are often concerned about gaining circulation among people of a certain age or income, so that surveys of their readership will produce the type of audience that advertisers are trying to reach, and, according to Margaret Hill, of *Time's* circulation department, "All we know about someone on a mail-

order list is that he's bought false teeth or something." Even in cases where mail-order lists are preferable, most heavy mailers use up the names on them and have to turn to compiled lists.

Compiled lists are produced in a flurry of individual initiative. "Everybody is in business locally," says Jack Oldstein. "A county clerk has four carbons, and he's running a little list business. I heard of a guy in New Jersey who was doing homeowners through mortgage papers and other records, and when I offered to market the list for him for twenty dollars a thousand he laughed at me. He's getting as much as a dollar a name from the local milk company." Almost anything that requires a license or a permit—dogs, marriages, barbers, swimming pools—is a matter of public record and is probably being noted down by a list compiler or an energetic part-timer. There is said to be one independent operator who makes a specialty of collecting the names of people who have been brought to court for non-payment of debts and then selling the names to loan companies. There are firms that take pride in being able to compile every conveivable type of list, and there are specialized firms, with names like Catholic Lists, Inc.; the Educational Directory; Teen-Mail, Inc.; and Investors' Listing Company. A low-salaried employee of a bank that acts as a registrar for a large corporation could offer a list of the corporation's shareholders to a stockbroker without going through any kind of list company.

"If it's a printed list, it's available," Standley Woodruff, of the Ed Burnett list-compiling company, said not long ago. "Anything on paper is fair game." Woodruff has a corollary to cover anything that is not on paper: "Anything is available if you're willing to pay the price per name it costs to compile it." Herbert Odza has always recognized the necessity of going to some lengths to acquire certain names. "When there's a proxy fight for control of a company, the company has to turn over the list of its stockholders to the court, and you can buy a copy of that," he said recently. "It's not illegal and not immoral, although it might be unethical. Birth names are usually bought from somebody in the hospital administration of-

fice. This type of thing is being done every day. In business, you must do things like this. A lawyer asks a question that he knows the court will strike from the record, but he wants the jury to hear it. You might think this is unethical, but it happens every day." In this diverse marketplace, most established list compilers concentrate not on underpaid clerks but on such widely distributed documents as trade directories, annual reports, and association rosters; their only subterfuge is to request a copy of a report or a roster in the name of a research company or a library or a student doing a research paper. The library of directories that a list compiler accumulates in this quest is often so extensive that he lends volumes to orthodox business libraries—although he would, of course, prefer to trade for a directory he doesn't have, so he could copy it during the transaction.

As practitioners of private enterprise, veteran list compilers, such as Jules Sherman, of Dependable Mailing Lists, are at their most impressive when they are squeezing marketable names from a document that most citizens would consider of limited interest and no commercial value. In the hands of Jules Sherman, a concert program from the Denver Symphony Society is a treasure. It has a list of patrons. It has a list of sponsors. It has a list of sustaining members, subscribing members, and contributing members. And Jules Sherman has a Denver telephone book. He also has the annual reports of a number of other symphonies, and a telephone book to match each one of them. Compilers are constantly improving what they can do with directories. Creative Mailing Service can now mine the standard directories of lawyers in a way that will send a mailing piece to only one lawyer in each firm—and the customer has a choice of reaching the senior partner or the man next in seniority or the man after that. If asked to put together a "custom-compiled" list, compilers are happy to extend their search far beyond the directories. For the Dictaphone Corporation, Ed Burnett once put together a list of "Business and Professional Markets (Individuals)" that drew names from nearly a hundred sources, including lists of yacht owners, church executives, missle-project directors, vanity-press customers, veteri-

parians, and buyers of mailing lists. (Dictaphone could hope to recover some of the expense by means of its own list-rental business; it offers four or five different lists of its customers.) Dunhill, Odza's firm, has offered a list, originally compiled for Rolls-Royce, called "Socially and Financially Elite Families" ("Included in this list are: holders of boxes at the Met. Opera House, Owners of Boats over 40′ in length, Contributors of $500+ to the Senatorial Campaign of Jacob Javits, Millionaire Members of the N.Y.C. Social Register, and the top Real Estate Syndicators"). Odza says that he received so many requests for a list of union pension funds—institutions that have considerable money to invest—that he went to Washington, where all the funds are registered with the government, found a little-known regulation that permits public inspection of the papers on record, put six accountants to work copying down the information he wanted, and has since been renting the resultant list steadily for a dollar a name.

Efforts to compile marketable lists produce such collections as "Men with Expensive Hobbies," "Special Formula—Individuals of Above Average Income and/or Intelligence," "Wealthy Families with Teenage Children," and "Women in the New York Area with $100,000 or More in Holdings." Probably the most widely used compiled lists, though, are simple compilations by profession. The American Medical Association list of doctors—which is rented by several medical-list companies that the A.M.A. franchises in return for a royalty of three dollars and fifty cents per thousand names on each rental—is considered an excellent list not only for drug-company advertisements but for magazine subscriptions and merchandise. Magazine publishers occasionally speak of doctors as "performing well"—meaning that they can usually be depended on to pay their bills and renew their subscriptions. According to Guy Yolton, the Republican National Committee first ventured into direct mail by sending a fund appeal to doctors during the first debate on Medicare, and a fund appeal to people on financial lists during the debate on withholding taxes from dividends and bank interest. Both were

profitable. The *Army Times*' list of servicemen is also considered effective for merchandise and financial offers. The reason, some direct-mail specialists believe, is that Army bases are away from large shopping centers, and that servicemen have steady incomes; others think it is merely a matter of soldiers' looking forward to mail call. Army doctors who have bought credit-card wallets from Ambassador Leather Goods must dance through the dreams of list brokers.

Even in compiled lists, mailers crave some sign of activity. A particularly valued type of compiled list is one composed of men who have recently been promoted or have just joined a new company. Compilers such as Creative Mailing Service and Ed Burnett cull trade magazines and newspapers and gather up four or five thousand names a month to add to lists called "Men in Motion" or "Newly Promoted Executives." The attraction of a man in motion only begins with the raise that he presumably received. A man who has just been promoted is likely to think about his role in the company, and might want to buy a book on executive management or subscribe to *Fortune* or the *Wall Street Journal*, both of which find such lists effective. He might also be musing on his new role outside the office and have concluded that he has reached a station in life that is properly accompanied by a bit of culture—perhaps a record club or a book club. One of his most appealing qualities is that he probably has not been included on many lists at his new office address and might be happy to read whatever mail he gets.

Most of life's milestones are celebrated profitably by the list business. There is a steady demand for lists of engaged girls and newly married couples; there is even a data card on a list called "Life Begins at 40" ("Men and women over 40 who have reecntly become in-laws. Top market for luxury and impulse buying"). The most profitable milestone of all produces what is known in the trade as the Birth List—although it is actually a list not of births but of new parents. A businessman with a less profound understanding of free enterprise than exists in the list business might think that couples on the Birth List would make good customers for diaper services and baby

products, and he might even extend the analysis to include a greater use of detergents. This is quite valid, of course, and is used by owners of Birth Lists, but for them it is only the beginning. New fathers, for instance, are known to be good prospects for correspondence courses. Doubleday finds that new mothers are fairly likely to become customers of its Dollar Book Club. Having children is ordinarily an activity of young families, and the *Reader's Digest* has used the Birth List partly to lower the average age of its readers for advertising purposes.

The Birth List has been greatly affected by the electronic age. At one time, collecting the names of new parents was a local affair. A diaper company would pay somebody in the hospital admissions office for a carbon of maternity admissions, or somebody in a laboratory would leak the names of expectant mothers to a baby-picture studio. There are still local birth lists—and local "prenatal lists"—but there are also two companies that specialize in births nationwide. The one in New York—the National Birth Record Company—claims that it can provide information on three million four hundred thousand of the four million one hundred thousand births that take place in the country every year. Marvin Monsky, one of the company's executives, says he has computers running twenty-four hours a day to keep track of the births; an advertisement for his firm in the *Reporter of Direct Mail Advertising* is headed "We punch holes in new parents." When all the holes are punched, Monsky knows much more than the fact that a baby has been born. He knows, for instance, whether the baby was born in a private or a public hospital, and if that is not strong enough indication of the parents' income, he can feed in information available from the Census Bureau about the median income of their neighborhood. "Age, race, income, religion—this is all possible to a degree," Monsky said not long ago. He can provide lists of new parents in particular parts of the country ("We can sell an Eastern name better than a Southern name"), a list of new parents above a certain income level, and a list of new parents who are new at being new parents and presumably have not yet formed buying habits for family shopping. Monsky considers his exact source of names a

professional secret, but he acknowledges that he has to pay for every name. According to Monsky, each hospital presents a different problem in supply, and he is confident that National Birth Record can find the best supplier. "We normally spend more money securing names than our competitors," he has said. "All our people are well-quailfied sources. If you buy names from a local dealer, he may hold on to them for a while, sell them to local clients while they're fresh, and then send along old names." The danger of getting old names also precludes the use of public records. "Those names could be sixty, seventy days old," Monsky says. "If you can't get in there fast, you're not selling a birth list, you're selling a list of people with children."

As it happens, Monsky sells a list of people with children, too. He says that a detergent company suggested to National Birth Record not long ago that a list of families with two or more children would be a list of families that would buy more of everything. Monsky now collects the names and addresses of all those who have appeared more than once in the Birth List over the past several years, changes the names to "Occupant," on the theory that even if the family has moved, another family with two or more children has probably replaced it, and comes up with a list of some six million two hundred thousand households. Monsky says that for merchandsing such products as Pillsbury's Funny Face drinks for children it is the best list in the industry. He also takes pride in the Birth List. "We believe that what we do is good, on the whole," he has said. "It's good for the people who receive it—information on how to take care of children, coupons worth a lot of money, and so on. In the unfortunate case that a woman loses a baby three or four days after the birth and she writes in, we do everything we can to clean her name off the list, and we send her a letter of apology and sympathy."

Some people in the trade believe that computerization will eventually result in great master lists of all magazine readers and all gadget buyers. A man in Washington who specializes in the names of people who have contributed to conservative causes is now reportedly able to produce

the names of three hundred thousand right-wingers, sorted on tape to avoid duplication. The Diners' Club will soon be able to rent out its members sorted by profession. Dun & Bradstreet can now produce a list that selects by type of industry, number of employees at each establishment, number of employees in the entire company, geographical location, sales volume, age of business, and (if the customer subscribes to the Dun & Bradstreet credit service) net worth and Dun & Bradstreet credit rating. Comupters have had an almost revolutionary effect on the master lists that already exist—the four or five lists, sometimes called "horizontal lists," that include almost every person in the country who might ever be expected to buy anything. Firms with direct-mail programs of a certain size—mass-circulation magazines, mass-appel charities, food companies that use coupons—eventually depend on horizontal lists almost exclusively, and computerization has made it possible for them to pick their best potential customers from the mass with extraordinary sophistication. There are abut fifty-five or fifty-six million households in the United States, and a list of some forty-one million of them can be compiled either by collecting all the names that appear in phone books, as O. E. McIntyre does, or by collecting all motor-vehicle registrations, as R. L. Polk & Co. does. The Reuben H. Donnelley Corporation combines the two sources—catching some people with no telephone (or no listing) who have automobiles, and some careless city dwellers who have telephones—and builds the "Donnelley Quality Index" of some fifty million names.

McIntyre's system of maintaining its list could hardly be simpler. There are approximately five thousand telephone directories published annually in the United States, and McIntyre buys a new copy of each one of them. When a new Kansas City telephone directory appears, a clerk in McIntyre's plant in Westbury, Long Island, compares it with a stack of punch cards that were produced from the previous Kansas City telephone directory. She draws a blue line through all the names and addresses that are identical to those she has on the punch cards and through all the business listings, and throws away the punch cards containing names that do not appear in the new directory.

Another clerk makes a new punch card for every name in Kansas City that does not have a blue line through it, and then a machine re-sorts the cards from alphabetical order to street-number order for inclusion on the master tape. Some of this work is farmed out to housewives; in some parts of Long Island drawing lines through names for McIntyre forms a sort of cottage industry.

Polk has a similar system for keeping its list fresh—it folds in names as cars are registered throughout the year, then begins a new list for each state as the new year's registrations become available—but it has a more complicated problem of original supply. Polk, like National Birth Record, must make a separate arrangement with each source—and it must get all fifty states for a complete list. In some states, the company can simply buy a directory containing all the information needed. In New Jersey, Polk is given all the information free in return for looking up the names and addresses of parking violators. In New York, the law permits the Bureau of Motor Vehicles to sell rights to the information. In 1961, both Polk and Donnelley were outbid in New York by a mailing house called Circulation Associates. According to a suit filed in 1963 by Circulation Associates (and still in litigation), Polk, having been denied the registrations itself, arranged with the Commissioner of Motor Vehicles to microfilm something called the MV-50 forms, which, it turned out, contained most of the information that is found on motor-vehicle registrations—except in more legible form. The Commissioner did not deny that; he said he had decided that the MV-50 forms were public record. Circulation Associates alleged that the Commissioner had "developed a personal acquaintanceship" with some of the officials of Polk—a phrase that might be said to represent a side of the list business that has existed since the first county clerk met the first list compiler many years ago. (Polk won the bid the next time it was offered, but Donnelley also continues to advertise a complete list. The two companies regularly share the cost of transforming the registration information into usable form, share the list that results, and, in some states, do not compete against each other in trying to rent it.)

A list of eighty per cent of the families in the United States is of practically no value unless it can be refined into categories of people who have more in common than ownership of a telephone or an automobile. The greatest single aid the compilers have for making this refinement is the Census Bureau. In order to maintain consistent statistics on the population, the Census Bureau, with the advice of a local committee, permanently subdivides a metropolitan area into tracts that contain roughly a thousand relatively homogeneous families. Within each tract, census-takers gather information from one of every four families, and on the basis of that sampling the Bureau publishes statistics on the median income and education of the people living in the tract, as well as a good number of percentages and averages concerning their housing, their professions, the size of their families and their ethnic backgrounds. Tracting began with a few cities in the 1910 census, and now covers almost sixty per cent of the population, including practically everyone who lives in a city. The list compilers fold the tract information into their master tapes, so that for a financial magazine, say, their computers can immediately pick out people who live in tracts where median incomes are nine thousand dollars or more, median educations are of more than twelve years, and the percentage of "managerial and professional wage-earners" is high. McIntyre offers twenty-five variables for selecting tracts, including value of owned homes, percentage of married couples with husbands under forty-five, percentage of married couples with husbands under forty-five and children under eighteen, and percentage of owner-occupied housing units. Donnelley has about the same number of selectors programmed into its master list, including the percentage of multiple-dwelling units and the percentage of non-white housing units. As it turns out, one of the minor disadvantages of being a Negro slum dweller in the United States is being deprived of a fair share of orange-juice coupons.

Although the average merchandiser might be delighted with such extensive statistics based on such a large sampling, the resourcefulness of the big list-compiling companies only begins with census tracts. The real skill is

what is occasionally called "getting inside the tract." Since the tape of a compiler of telephone lists is arranged by address, he can easily reach only people in single-family dwellings (more children) by instructing the computer to skip over any address that has more than one name listed. The computer can also skip any telephone listed under a female name (lower income). It can select only families that have been on the list for a specified number of years (older; fewer children). The McIntyre list is carried on reels of magnetic tape that hold two hundred and forty thousand names each—the entire list of forty-one million families looks like a largish home-movie collection—and in three minutes the computer can pick out of a reel the names suitable for, say, a "TV food-snack" mailing, eliminating tracts below forty-five hundred dollars' annual income, female names, apartments, and families that have been at the same address more than eight years. For coupon offers, the McIntyre computers can replace names with "Occupant," which is less personal but more deliverable, and for magazines that prefer not to send subscription offers to their own subscribers, such as *Time* and the *Reader's Digest*, it can match its tape with the magazine's tape and eliminate the names of people who already subscribe.

If a man who earns ten thousand dollars a year happens to be hiding in a tract with a median income of eight thousand dollars, a compiler is likely to flush him out sooner or later. Polk and Donnelley know about his two cars, and they know the make, model, and age of both of them. That information is, of course, of some use to automobile manufacturers—Ford once won a prize from the Direct Mail Advertising Association for a mailing that it sent to owners of Chevrolets and Plymouths—but it can also be used by any merchandiser who wants to add to the number of people available in ten-thousand-dollar tracts by dropping to eight-thousand-dollar tracts and selling only owners of more than one car. Polk has now perfected what it calls the "Current Market Value Index," a program of checking the value, as listed in the standard used-car manual, of each car registered to a family, adding up the figures if there is more than one car, and then

assigning each of the forty-one million car-owning families in the United States a number, from zero to nine, that represents the total value of its automobiles. At the same time, Polk is converting to magnetic tape its "Household Census List," which is composed of information that the company acquires in the course of putting together the city directories it publishes in most major American cities (except the four largest). When the list is completely converted, sometime next year, Polk advertises, it will "contain more vital selection factors on a household-by-household basis than any mass list ever compiled." For the twenty-four million families that will eventually be on the "Household Census List," Polk will know—not by statistical probability but by precise information on each individual—"occupation of head of household and all persons over 18, marital status, wife's name, whether wife works, number of children, age range of children, total persons in the household, total employed persons in the household, occupancy status (owner or renter), primary families, sub-families, and secondary families, type of dwelling (single or multiple), length of residence at current address, age of structure, telephone number if there is a phone, spending index (estimated annual expenditure for current consumption)." The finished product will be what Polk calls a "precision marketing tool."

Somehow, despite the skill of the list compilers and the enterprise of the list brokers, there are names that cannot be rented. Most magazines will release the names of their active subscribers only in exchange for other active names, usually on a one-for-one basis, and will rent out only the names of "expires." A number of magazines, such as *Time*—which trades "actives" with firms like the Book-of-the-Month Club, the Columbia Record Club, and *Harper's*—will not rent out even expires, and a few magazines will release no names of subscribers, actives or expires, for rent or for trade. There are firms in almost all fields of business that rent out lists of their customers—Kayser-Roth, a wholesale clothing manufacturer, has gone as far as to rent out a list of the retail stores that carry its products—but even in businesses that involve credit cards there are some companies (notably car-rental firms) that

do not rent out their lists. According to list compilers, an up-to-date alumni list of some colleges can be obtained from the secretary of the alumni association, but the graduates of other colleges have to be collected from the alumni directory, which is, of course, out of date by the time it is printed. Many department stores do not rent out their lists, and the credit bureaus used by department stores to clear charge accounts ordinarily do not put the credit-checked names on the open market, although some of them will provide a "custom-compiled" list for, say, an oil-company credit-card mailing or a promotion mailing for a new branch of a department store. Large charities normally do not rent out their lists, although small charities often sell their lists to a broker, who combines them to create something like "Catholic Donors" or "Donors to the Cause of Peace." Aware of the fact that a large organization's roster is always obtainable, some societies and clubs try at least to make some money from the situation by having their lists marketed and policed by a list house —Polk offers two hundred and forty thousand Junior Chamber of Commerce members at twenty dollars a thousand, and fifty thousand Jaycee officers, all of whom have demonstrated intense activity, at thirty-five dollars a thousand—but other societies put dummy names on their rosters and object strenuously when they discover that the list has been used. List compilers say that they do not continue to use a roster or directory of an organization that has formally objected. In creating lists that have to be collected from a number of sources, compilers invariably miss a few names. Even a man as resourceful as Herbert Odza has no arrangements with three hundred of the twelve hundred bell captains of hotels that hold U.J.A. fund-raising banquets. And some seven hundred thousand babies manage to get born in this country every year without revealing to Marvin Monsky the name, age, race, and probable income of their parents.

"People are always asking me how to get off mailing lists," Myron Shapiro, of the Mid-Century Book Society, said recently. "I tell them there is only one way—and dying is not it." Dying will have no effect on a mail-order list until the list is cleaned and an envelope marked

"Return Requested" is actually returned; even then, the name may be picked up again from a directory or a roster by a compiler. Shapiro's advice for anyone who wants to risk being considered a bum by Harry Maginnis is to move and leave no forwarding address, not even for first-class mail. Of course, Shapiro's friend, once moved, would have to give up a few habits he had at the old place. He could not have a listed telephone, and he could not own a car, unless he wanted to take a chance on driving it without license plates. He would have to give up such conveniences as subscribing to magazines and ordering theatre tickets by mail. He would be forced to ask his university to strike his name from the alumni rolls (or, at least, he would not inform the alumni association of his sudden move), and he would resign from any club or professional society that might want to know the address of its members—even members who had no credit cards and refused to contribute to charity. He would, of course, abandon the ballot, and, to be perfectly safe, he and his wife would have to be satisfied with the number of children they already had.

"I hope he's not moving into one of six hundred and forty luxury apartment buildings in New York," Herbert Odza said not long ago, in a discussion of Shapiro's hypothetical friend.

"Why not?"

"We pay the super or someone in the management company of each building for the names of people who move in."

"He is not moving into one of those apartments."

"And he's not voting?" Odza asked.

"That has already been decided."

"And he's not writing his congressman, of course."

"His congressman!"

Odza explained patiently that people who write their congressmen often show up on lists of people who write their congressmen; they have, after all, shown themselves to be somewhat active. In fact, Odza said, one of the most successful lists in the financial field for a while was a list of people who had written to their congressmen objecting to the proposed withholding tax on bank interest and divi-

dends—an indication that they had some bank interest and dividends to be taxed.

"He will not write his congressman."

"Even if he doesn't," Odza said, "the lady in the apartment next door may be selling Christmas cards, and the Christmas-card company may ask her to suggest names of any neighbors interested in making some extra Christmas money."

To avoid being betrayed by a casual acquaintance, Shapiro's friend will have to take the final step of withdrawing competely from society—tutoring his own children, and permitting his wife to go out only for groceries, with instructions to pay in cash and speak to no one. Asking customers for names of acquaintances seems to be an increasingly popular device. "Your best prospects are your current customers," Lewis Kleid once wrote in a column that appeared in the *Reporter of Direct Mail Advertising*. "Ask them to recommend names of friends. Ask them to sell their friends. The names received from this source constitute an unusually responsive audience, and the lists which result from this effort can, in addition, be rented to produce additional revenue."

Anyone whose reaction to a particular piece of mail is an urgent desire to have his name removed from that particular mailing list has at his disposal no foolproof method short of the address-changing that Shapiro advised for getting off all lists. Some list owners will remove a name from their list upon request, but a good many find that removing one name is mechanically impossible or financially impractical. The Diners' Club can (and does) remove a member's name from the rental list if he requests it. However, unless the member has spelled his name in an unusual way on his application or has some other method of identifying the Diners' Club address plate, there is no way for him to know that if he objected to the totem pole he received, along with a fund request, from the St. Labre Indian School, or did not want to receive membership offers from the Playboy Club or the Record Club of America, he should complain to the Diners' Club. Complaining to the firm that sent the mail is a common mistake. It is likely that the unwanted piece of mail is the

result of a rented or traded list; the firm that sent it used the list on a one-time basis and would not even know the complainant's name—until he complained. There are people who indicate their desire to be removed from a particular list not by a polite letter but by filling the reply envelope with weights, or by sending back the reply card of one offer in the reply envelope of another, or by punching additional holes in reply cards that are in the form of punch cards. Like most people who have become desperate enough to resort to guerrilla tactics, they are fighting impossible odds. They often send their symbols to the wrong firm, of course, and even if they reach the right firm, the list remains unaffected, since most of the more demonstrative guerrillas—such as the one who taped a Kiplinger reply card to a box full of dead rats—prefer to remain anonymous.

Not paying for something ordered through the mail is an easier way to get free merchandise than shoplifting—after about six months and a few threatening letters, most companies charge off the loss—but it will not remove the nonpayer's name from whatever list directed the merchandise to him in the first place. There is now a credit service—the Hooper-Holmes Bureau—that collects the names of non-payers (universally known in the mail-order business as deadbeats) from subscriber firms, which can, in turn, check the deadbeat file before mailing out merchandise on credit. In only three or four years of operation, Hooper-Holmes has managed to put together a magnetic tape containing the names of more than five million certified American deadbeats. However, the tape is normally not checked until after merchandise is ordered, so being one of the Hooper-Holmes five million does not mean removal from a mailing list. To a student of the mailing-list business, of course, a deadbeat—like anyone else who demonstrates activity of any sort—is a person who has preselected himself into a category. There was an earlier deadbeat file in the trade, and using it only to check credit struck at least one broker as being about as shortsighted as using a list of magazine subscribers only to distribute magazines. "I finally figured it was a swell list of people for cash offers," Arthur Martin Karl recalled recently. "The man who

was running the association was horrified at the thought. He looked on those deadbeats as vermin, and wouldn't think of renting them out to anybody." Hooper-Holmes, a modern company, does not consider its deadbeats vermin, or even deadbeats—"We prefer to call them delinquents," the man in charge has said—but it has no plans to rent out their names.

About the most dependable strategy for someone who wants his name removed from a list is to try to clean himself off it. He can carefully read every envelope he receives by third-class mail until he comes across one that has a "Return Requested" notice on it. That one he will refuse to accept. Ordinarily, rejected third-class mail is thrown away by the post office, but rejected third-class mail with a "Return Requested" notice on it is returned to the sender, who, having list-cleaning in mind, will presumably remove the name. The man who has devoted all this energy to having his name removed from a list will have the comfort of knowing not only that he has been removed but also that he has cost the mailer eight cents—probably as much as the list owner has made from his name in four rentals.

Why anyone would ever want to go to all that trouble just to get off a list a mystery to people in the list business. The only consequence of being on a list, after all, is receiving mail, and a survey taken by the A. C. Nielsen Company for the Direct Mail Advertising Association a few years ago concluded that eighty-five per cent of the population had "no general dislike of direct mail." (The D.M.A.A. tends to see things on the bright side; the eighty-five per cent included people who "like some, not all" and people who "don't care one way or another.") Representatives of the direct-mail industry would never dispute the notion that it is rather difficult for an adult American to stay off mailing lists. They emphasize that an American is on a list from the day he is born (or, if he happens to make one of the prenatal lists, from quite a few days before he is born). If the American is Shapiro's friend, he may argue that he has some ownership rights to his name, and that they are being violated by the people who rent it out. "Names are not captives," the Lewis Kleid

advertisement says. "They can't be fenced in. They are not secret or confidential. Names are found in phone books, directories, voting lists, auto registrations, newspaper clippings, and many other places." How can there be a violation if, as Arthur Martin Karl has said, "there is no such thing as a virgin name"? It is constantly stressed that commerce in names is a normal part of American life and an important part of American business—and, to an increasing extent, it is. Bernard Fixler, of Creative Mailing Service, has said, "People who criticize direct mail don't realize what kind of country we're living in; it's *based* on advertising and selling." Although the list business itself has been almost ignored by the public, those engaged in it are reminded of public resentment against the mail it produces every time there is a reference to "junk mail"—a phrase that they find extremely unappealing as a description of the source of their livelihood. Boyce Morgan, of Kiplinger—one of the few people in the industry who speak as if any of the resentment could be created by the way lists are rented and traded—has been particularly concerned about finding a way to avoid the duplication caused by the common practice of using a number of lists for one mailing. "It is perfectly possible for a prospect to receive a dozen identical Kiplinger solicitations within a few days of each other, or even on the same day," Morgan once said in a speech before the Hundred Million Club, a Manhattan direct-mail organization that was originally composed of mailers who sent more than a hundred million pieces of mail every year. "And make no mistake: when this happens, that Kiplinger mail is pure, unadulterated 'junk' to the recipient." There is, however, a widely held theory in the field that duplication is not only harmless but probably beneficial. The *Reporter of Direct Mail Advertising* has quoted Lewis Kleid as saying, "Irrespective of the irritation factor, most mailers argue that duplicates can be a plus if mailings to similar lists are staggered to insure that recipients will not receive two or more identical pieces on the same day. . . . The recipient who ignored the first letter might be impressed by the second or third impact."

Many people in the industry believe that attacks on direct mail can often be traced to fear of economic competition on the part of the newspapers. Discussing the role of newspapers not long ago, Henry Hoke, Jr., publisher of the *Reporter of Direct Mail Advertising*, said, "I hate their guts." Hoke and other defenders of direct mail immediately answer any newspaper article that gives suggestions to the anti-direct-mail guerrillas or that dwells on the fact that the post office loses several hundred million dollars a year delivering bulk-rate third-class mail—meaning that the guerillas are paying taxes to subsidize the mail they are doing their best not to receive. The offending newspaper is likely to receive a letter from a congressman who appreciates the role of the direct-mail industry in the free-enterprise system and who will remind the editor that the post office loses less money delivering a piece of third-class mail than a piece of second-class mail—a class that includes newspapers. When Philip Weld, publisher of the Beverly, Massachusetts, *Times*, offered to send interested readers an "I Hate Junk Mail Kit"—an episode that is occasionally referred to inthe direct-mail press as "the ugly Beverly, Mass., affair"—Henry Hoke, using the tools of the trade, mailed his counterattack to every home in Beverly, every United States senator and representative, every retailer in Beverly, and six hundred editors of "retailer-oriented trade magazines." ("We're indebted to John Jacobs, of Mailways of New England, Inc., Manchester, N.H., who contributed the Beverly names from his 3½ million occupant names in New England," Hoke wrote.) The unkindest cut was that no list broker approached Weld about renting the list of the people who had sent in for the kits.

One reason the direct-mail industry reacts so quickly to public criticism is that it is particularly dependent on the good will of public institutions—Congress, the Post Office Department, the Census Bureau, the various government departments that serve as sources of lists. Even the legislature of a single state could disrupt a nationwide business, such as compiling the motor-vehicle list. The current governmental crisis in the industry is the Post Office Department ruling that after January 1, 1967, any bulk-rate

third-class mail that is not Zip Coded will go at the third-class piece rate of four cents instead of third-class bulk rate of two and seven-eighths cents. Although the large lists are already Zip Coded, some mailers are expected to decide that a number of lesser lists—particularly premium lists ("These people sent three PET DOG FOOD LABELS plus $2.00 for either a dog tag or collar embossed with the name of the pet") and lists that are rarely rented—are not worth the expense involved in adding a Zip Code number to each name, and some people believe that the volume of third-class mail will probably decrease for a while.

The more characteristic crises concern legislation. The list business always seems to be under threat of some proposed piece of restrictive legislation that is unlikely ever to become law. Pornography is usually the intended target. Congressional hearings that are of interest to the list business seem to consist mainly of testimony by the Citizens for Decent Literature or the National High School Program to Obtain Freedom from Filth. A bill introduced by Congressman Glenn Cunningham, of Nebraska, and passed by the House would make it possible for anyone who receives a piece of mail (or whose child receives a piece of mail) that he considers "obscene, lewd, lascivious, indecent, filthy, or vile" to arrange with the postmaster to have his name removed from the list responsible for directing the lewdness to his door. "The reason that I came upon this scheme was that when my boy was a Boy Scout, aged about fourteen, he took a Boy Scout magazine," Cunningham said in committee hearings. "In the magazine there were advertisements, and there was one which said, 'Start a stamp collection. Send twenty-five cents for various types of stamps.' He did this. He sent the twenty-five cents in and got his stamps—a legitimate transaction. No argument about that, and most children start stamp collections between the ages of twelve and sixteen. About two years later, he started getting this obscene type of advertising through the mail." Another bill, also aimed at pornography, would make it mandatory for list brokers to register with the government and furnish information on their transactions.

It is customary for the sponsors of such legislation to emphasize their admiration for the established direct-mail

industry and to make it clear that they are interested only in foiling the purveyors of filth. Despite these assurances, the direct-mail industry (as well as the Post Office Department and the American Civil Liberties Union) regularly testifies in opposition to bills like the one introduced by Cunningham. The president of the D.M.A.A., Robert DeLay, flanked by representatives of respectable publishing houses, arrives at the hearing carrying a copy of the D.M.A.A. Code of Conduct and a list of the distinguished corporations that have won the D.M.A.A. Gold Mailbox Award. He points out that smut peddlers do not deal with legitimate brokers but with each other, and that legislation would permit any crank to disrupt the operations of a section of the economy that is responsible for some thirty billion dollars in sales annually. On one of these occasions, DeLay said, "To kill a few cockroaches in the cellar, as it were, these bills would set fire to the entire house of American business."

The State of New York, where a good part of the list business is situated, provides at least its share of legislative threats. Two years ago, a New York assemblyman introduced a bill that would end the practice of selling the state's motor-vehicle registrations to the highest bidder. After a small outburst of editorial approval, the bill was more or less forgotten. More recently, a bill was introduced that would prohibit a bank or a brokerage house or any other firm that has a traditionally confidential relationship with its customers from renting out their names without written permission. The bill is unusual in that it actually questions the practice of renting and trading names. Discussion of direct mail—whether in legislatures or in newspapers—usually concerns only the mail itself. Newspaper stories discuss "junk mail" and "the sanctity of the mailbox," but they rarely raise questions about the ownership of names. The Direct Mail Advertising Association has not had A. C. Nielsen take a survey on what percentage of the population has "no general dislike" of the fact that someone is making money from renting out their names, or what percentage would consider this perfectly all right as long as the owner of the name received a percentage of the price. No one has proposed legislation

that would require a company to inform its customers that their names will be rented out—so that a reader who is invited to vote in the *Playboy* Jazz Poll would do so with the understanding that *Playboy* will then rent out his name, or a camera owner who sends films to be developed at the Minox processing laboratories would know that Minox is advertising that such transactions keep the addresses on its warranty list up to date and therefore more rentable. No one has suggested that the application for an American Express credit card should contain a footnote saying, "I understand that if the information I have listed above demonstrates an acceptable credit rating, American Express will use that fact as a marketing aid in renting out my name," or that the Book-of-the-Month Club coupon should be changed to read, "I have the right to cancel my membership any time after buying these three books, and I am aware of the fact that my name may be traded to *Time*, the Weekly Newsmagazine."

People in the direct-mail industry would undoubtedly argue that such disclosures would be harmful to business, and in the past such arguments have been successful. Congressman Morris Udall, of Arizona, once introduced a short-lived bill that was much more threatening than the Cunningham bill—it would have permitted a recipient to demand removal of his name from a list if he considered a piece of mail "obnoxious"—and during the hearing on the bill he asked, "Why is it, in this great country, that if some poor housewife or some poor congressman or some poor citizen does not want to be on a mailing list, or does not wish, for any reason, to receive these materials, he cannot simply get off the mailing list by making a reasonable, rational request?" The industry witnesses gave Udall some complicated explanations about the immense expense and confusion that could be caused by trying to remove one name from a list; in summary, they said it would be bad for business. A student of the list business as a concentrate of free enterprise could find the answer in one subhead of the hearing testimony, which reads, "Lists Are Precious Commodities." Udall was impressed with the industry's presentation. "By the time they got through," he recalled recently, "they were saying that

fifty thousand people would be put out of work, the economy of the whole country would be damaged, and all the universities and charities of the country would go broke. I told them that all I wanted to do was get off their damn list."

—CALVIN TRILLIN

OPINION.

June 30, 1967

GARRITY, J. The plaintiff, National Labor Relations Board ("Board"), seeks enforcement of a subpoena *duces tecum* directed to the defendant Robert W. Stoddard, as president of the Wyman-Gordon Company ("Company"), or alternatively, a mandatory injunction compelling the defendant Company to comply with the election rule promulgated by the Board on February 4, 1966 in *Excelsior Underwear, Inc.*, 156 NLRB No. 111, requiring an employer to file with the Board's Regional Director, in the Region where the union representation petition is pending, a list of the names and addresses of all employees eligible to vote in the representation election ("*Excelsior* list"). The jurisdiction of this court is asserted on the basis of §§ 9(c) and 11(2) of the National Labor Relations Act, 29 U.S.C. §§ 159(c) and 161(2), and on the basis of 28 U.S.C. § 1337.

Since May 16, 1962 the Board has conducted five elections among the defendant Company's employees to determine whether they wished to be represented by a union. None of the following unions that participated in various of the elections was able to gain a majority vote of the employees: the United Automobile Workers of America, AFL-CIO ("Autoworkers"), the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO ("Boilermakers"), and the United Steelworkers of America, AFL-CIO ("Steelworkers").

The last election was held on September 29, 1966 at the petition of the Boilermakers, and with the intervention of the Steelworkers.[1] Prior to this election, counsel for the Company notified the Board that the Company refused to consent to an election because under the Board's Consent Election agreements an employer contracts to comply with all Board rules and regulations, and the Company did not intend to comply with the *Excelsior* rule, which it contended was invalid. Both unions filed timely objections to the election based upon the Company's refusal to comply with the Regional Director's direction to submit an *Excelsior* list. In October 19, 1966 the Regional Director upheld these objections, set the election aside, and directed that another election be held.

On December 2, 1966 the Regional Director notified the Company that the election was to be held on December 29, 1966 and requested that an *Excelsior* list be filed no later than December 9, 1966. The Company again failed to file the list and, at the request of the unions, the election was postponed. On December 27, 1966 the Regional Director issued a subpoena *duces tecum* directing the defendant to provide the Board with the Company's personnel and payroll records or, in lieu thereof, with an *Excelsior* list. On December 30, 1966 the Company filed a motion to quash the subpoena, which the Board denied on January 10, 1967. Upon the defendant's continued failure and refusal to comply with the subpoena, the Board instituted this action.

The enforceability of the Board's *Excelsior* rule has been the subject of several district court decisions. The majority, including *N.L.R.B.* v. *Wolverine Industries*, E.D. Mich., 1966 F.Supp. , 64 LRRM 2060, and *N.L.R.B.* v. *Rohlen*, N.D. Ill., 1967, F.Supp. , 64 LRRM 2168, have ordered compliance with the Board subpoena. The minority view, denying enforcement of the Board subpoena, is represented by *N.L.R.B.* v. *Hanes Hosiery Division—Hanes Corp.*, M.D. N.Car., 1966, F.Supp. – , 63 LRRM 2513, and *N.L.R.B.* v. *Montgomery Ward & Co.*, M.D. Fla., 1966, F.Supp. , 64 LRRM 2061. As yet, the ques-

[1] Approximately 1700 employees voted in this election. 226 voted for the Boilermakers, 555 voted for the Steelworkers, and 903 voted against both unions.

tion has not been decided by a court of appeals, but appeals are pending from the *Hanes* and *Rohlen* decisions and perhaps from others. The major issue presented has been whether an *Excelsior* list is embraced within the term "evidence" as it is used in §§ 11(1) and 11(2) of the National Labor Relations Act, 29 U.S.C. §§ 161(1) and 161(2).

When the Board seeks enforcement of a subpoena in a district court pursuant to § 11(2), "the scope of permissible judicial inquiry in deciding whether such an aplication should be granted or denied . . . is extremely limited." *N.L.R.B.* v. *C.C.C. Associates, Inc.*, 2 Cir., 1962, 306 F.2d 534, 538. The court has jurisdiction to enforce the subpoena if the Board was acting within its statutory authority in issuing it and if the material sought is not "plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp.* v. *Perkins*, 1943, 317 U.S. 501, 509; *United States* v. *Morton Salt*, 1950, 338 U.S. 632, 642.[2]

A preliminary issue in this case is the validity of the *Excelsior* rule, which the defendants challenge on the ground that the Board in adopting it did not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. § 1001 *et seq.* The Supreme Court has said that administrative agencies, exercising their "informed discretion" may proceed by general rule or by *ad hoc* decisions. *Securities and Exchange Commission* v. *Chenery Corp.*, 1947, 332 U.S. 194, 200-203. When the Board elects to proceed by rule of decision, as it did in *Excelsior*, the publication and rulemaking provisions of §§ 3(a) and 4 of the Administrative Procedure Act, 5 U.S.C. §§ 1002(a) and 1003, do not apply. See *N.L.R.B.* v. *A.P.W. Products Co.*, 2 Cir., 1963, 316 F.2d 899, 903-906; *N.L.R.B.* v. *E. & B. Brewing Co., Inc.*, 6 Cir., 1960, 276 F.2d 594, 598, *cert. denied*, 366 U.S. 908. Nor do the adjudication provisions of §§ 5, 7 and

[2] See *Cudahy Packing Co.* v. *N.L.R.B.*, 10 Cir., 1941, 117 F.2d 692, at page 694: "When an application is filed with a District Court for an order requiring obedience to a subpoena it may inquire only to ascertain that a proceeding is pending before the Board of which it has jurisdiction and that the evidence sought relates to or touches the matter under investigation. If these facts are found to exist, it is the duty of the court to order obedience to the subpoena."

8 of the Administrative Procedure Act, 5 U.S.C. §§ 1004, 1006 and 1007, apply, since proceedings involving the "certification of employee representatives" are expressly exempted from these provisions by § 5(6). The court believes, therefore, that the Board acted within its authority in promulgating the *Excelsior* rule and that it is valid.

Was the Board acting within its authority in issuing the subpoena in the present case? It has authority to issue subpoenas under § 11(1) of the National Labor Relations Act, 29 U.S.C. § 161(1), if the "evidence whose production is required does . . . relate to any matter under investigation" and does "describe with sufficient particularity the evidence whose production is required." Clearly the information sought is described with the requisite "particularity" and the issue of union representation and the regulation of the election are "matter[s] under investigation" by the Board. National Labor Relations Act § 9(c), 29 U.S.C. § 159(c). Whether or not the *Excelsior* list is "evidence" is a closer question.

Standard definitions of "evidence", i.e., whatever tends to prove or disprove the existence of something or make clear the truth or falsehood of something, are not very helpful because the "something" at issue in this case is a group preference rather than a demonstrable fact. Also, the Board's function here is far different from that of the traditional, passive fact finder. The Board is conducting an active representation investigation in which the regulation of an election is an integral part. The ultimate issue to be resolved by the investigation is whether the Company's employees want to be represented by the Steelworkers, the Boilermakers, or no union. The Board has determined that an *Excelsior* list of the names and addresses of all employees eligible to vote in the election, to be made available to the unions to facilitate the communication of election issues, is necessary and relevant to the resolution of that ultimate issue.

Although courts which have enforced Board subpoenas of material sought in representation proceedings have not discussed specifically whether the material was evidence, they have impliedly found that it was, e.g., *N.L.R.B.* v. *Northern Trust Co.*, N.D. Ill., 1944, 56 F.Supp. 335, 336, *aff'd* 7 Cir.

1945, 148 F.2d 24; *N.L.R.B.* v. *Duval Jewelry Co., Inc.*, 5 Cir., 1958, 257 F.2d 672, 673. In *Cudahy Packing Co.* v. *N.L.R.B.*, *supra*, the court enforced a Board subpoena of a company's personnel and payroll records so that the Board could compile a list of the names of the employees eligible to vote in an election. In the instant case, the Board subpoena demands production of the same type of records to compile the same type of list, the only addition being the adresses of the employees.[3] It is difficult to see why addition of the employees' addresses should change the result. The court concludes that, in the context of § 11 of the Act, "evidence" means not only proof at a hearing but also books and records and other papers which will be of assistance to the Board in conducting a particular investigation.

The question remains whether the court in its discretion should order compliance with the Board's subpoena in this case. One of the duties of the Board in administering the Act is to determine expeditiously, *Boire* v. *Greyhound Corp.*, 1963, 376 U.S. 473, 477-479, whether a particular group of employees wish to be represented by a union. Implicit in this duty is the responsibility of assuring that the employees' choice is as enlightened as possible, made with fair access to the arguments for and against each alternative. To require an employer to provide a list of the names and addresses of the employees eligible to vote seems a reasonable way of assuring the "candidates" fair access to the "electorate." This is particularly evident in a case such as this where there are over 1700 employees.

On balance, the Company has no substantial interest in refusing to provide such a list. Furnishing the list would not impose a heavy burden upon it since it already furnishes a list of the names of its employees; adding their addresses would present little difficulty. Even assuming that the defendant has standing to assert its employees' right to privacy, which is debatable, the mere disclosure of employees' addresses is not an invasion of their right

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[3] In the *Cudahy* case it is likely that the company had the alternative of simply providing a list of the names of the eligible employees, just as in this case the Company has the alternative of providing the *Excelsior* list itself.

to privacy nor can it reasonably be expected to produce such an invasion.[4]

The Company contends among other things that a list of the names and addresses of 1700 employed persons is valuable and that enforcement of the *Excelsior* rule would compel it to violate § 302(a) of the National Labor Relations Act, 29 U.S.C. § 186(a), which makes it a crime for any employer to deliver a "thing of value" to anyone seeking to represent his employees. The possible value of such a list as a mailing list gives this contention some surface plausibility. But it must be rejected as patently contrary to the intent of Congress in enacting the statute. *Zentner* v. *American Federation of Musicians*, S.D. N.Y., 1965, 237 F.Supp. 457, 463. The obvious purpose of the statute was to protect employees from harm, not from help.

Accordingly, it is ordered that the defendants comply with the plaintiff's subpoena either by producing personnel and payroll records containing the names and addresses of all employees eligible to vote in the representation election or by filing with the plaintiff a list of the names and addresses of all such employees.

W. ARTHUR GARRITY, JR.
United States District Judge

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[4] In view of the court's findings, there is no need to pass upon the Board's alternative application for a mandatory injunction "as an aid in the administration of the statute", *Walling* v. *Brooklyn Braid Co.*, 2 Cir., 1945, 152 F.2d 938, 941. The court notes, however, that the cases relied upon by the plaintiff, e.g., *United States* v. *Shafer*, 4 Cir., 1956, 229 F.2d 124, *cert. denied*, 1956, 351 U.S. 931, and *Walling* v. *Brooklyn Braid Co.*, *supra*, did not involve mandatory injunctions, and that cases in which they have been ordered in aid of federal agencies appear to be distinguishable, e.g., *Porter* v. *Lee*, 1946, 328 U.S. 247, 251.

Order.

GARRITY, D.J.

In accordance with the Opinion of the Court dated June 30, 1967, it is hereby ordered that the defendants comply with the plaintiff's subpoena either by producing personnel and payroll records containing the names and addresses of all employees eligible to vote in the representation election or by filing with the plaintiff a list of the names and addresses of all such employees.

By the Court,

RUSSELL H. PECK, Clerk
By: KATHLEEN M. SMITH
Deputy Clerk

W. ARTHUR GARRITY, JR.
United States District Judge

Date: July 17, 1967

Order Staying Execution on Motion by Defendant.

The defendant having moved for a stay of execution of or any proceedings to enforce the judgment entered in the above-entitled cause pending the disposition of the motion of said defendant for a stay of execution pending appeal it is hereby ordered, that execution of or any proceedings to enforce said judgment be and the same hereby is stayed until the disposition of said motion.

W. ARTHUR GARRITY JR.
United States District Judge

July 26, 1967

Notice of Appeal.

[Filed August 28, 1967.]

Notice is hereby given that Wyman-Gordon Company and Robert W. Stoddard as Chairman of the Board of Directors and Chief Executive Officer of Wyman-Gordon Company, defendants above named, hereby appeal to the United States Court of Appeals for the First Circuit from the final judgment entered in this action on July 19, 1967.

By QUENTIN O. YOUNG
Attorney for Appellants

August 28, 1967

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7000.

WYMAN-GORDON COMPANY ET AL., APPELLANTS

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[270 F. Supp. 280]

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

June 12, 1968.

ALDRICH, *Chief Judge*. This is an appeal from an order of the district court enforcing compliance with a National Labor Relations Board subpoena which ordered an employer to furnish names and addresses to its employees. The issuance of the subpoena stems from efforts of two unions, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (Boilermakers), and the United Steelworkers of America, AFL-CIO (Steelworkers), to represent some 1750 production and maintenance employees at appellant's plants in three Massachusetts communities. The Board's Regional Director, after investigation and hearing, ordered an election and directed appellant, in accordance with the rule announced in *Excelsior Underwear, Inc.*, 1966, 156 N.L.R.B. 1236, to furnish the Board a list of the names and addresses of all employees eligible to vote. Appellant agreed to furnish a list of names, but refused

to supply addresses. Notwithstanding this refusal, the election was held, resulting in 226 votes for the Boilermakers, 555 for the Steelworkers, and 903 against any union.

On objection by both unions, the Regional Director set aside the election and ordered a new one. The Board affirmed this decision. Again the Regional Director demanded an *Excelsior* list, and again appellant refused. The subpoena then issued. The Board filed a complaint seeking enforcement of the subpoena or, alternatively, a mandatory injunction directing appellant to comply with the *Excelsior* requirement. The district court ordered enforcement of the subpoena, and this appeal followed. By it appellant has launched a broadside attack against the *Excelsior* rule, challenging its substance, the procedure of its promulgation, and the statutory basis of the subpoena power invoked to enforce it.

The court is of one mind in not being greatly impressed by the arguments challenging the wisdom of the *Excelsior* rule, but this is a matter on which the majority of the court does not feel called upon to make a decision. We mention briefly the Board's concern in insuring an informed employee electorate, and in balancing management's right of access to employees in the plant through the mails with a right on the part of unions—and anti-union employees—to have access to the addresses of a constantly changing roster of employees. It is unnecessary to repeat the Board's responses in *Excelsior* to the contentions that its authority to compel disclosure is limited to cases where other channels of information do not exist and that such compulsory disclosure invades the privacy of employees. Likewise we are not greatly impressed by the contention that compelling a list of names and addresses forces appellant to "interfere" with a labor organization, in violation of 29 U.S.C. § 158(a)(2), and to give a "thing of value" to a labor organization, in violation of 29 U.S.C. § 186. The former statute, as is indicated by the cases cited to us by appellant, is concerned with acts of favoritism. It is difficult to think that supplying the Board with information, pursuant to a Board order, which the Board will give to all persons alike who

show a legitimate interest, would be considered a proscribed gift.

A threshhold question, however, is raised by appellant's claim that the *Excelsior* rule is invalid because, concededly, it was promulgated in disregard of the notice and publication requirements of the Administrative Procedure Act, 5 U.S.C.A. §§ 552, 553.[1] In the opinion of the majority of the court this issue is determinative.

Events leading to the establishment of the rule grew out of two consolidated cases coming before the Board on union challenges of elections on the ground that the employers had refused to supply the unions with lists of names and addresses of employees so that the unions might answer a campaign letter sent by the company to the employees. Recognizing the problem to be one affecting more than just the parties before it, the Board chose to solicit the assistance of selected amici curiae, and, ultimately, to establish a rule which not only did not apply to the parties before it, but did not take effect for thirty days.[2] In so doing we consider that the Board, to put it bluntly, designed its own rulemaking procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest.

In presently justifying its position the Board does not seek to carve out for itself the special defense suggested by our brother Coffin in dissent, but asserts that what it did was proper administrative action approved by the Court in *SEC* v. *Chenery Corp.*, 1947, 332 U.S. 194. It is, of course, true that the Court there recognized that an adjudicatory administrative body may promulgate rules through decision as well as through more formal

[1] We are not here concerned with the effect of failure to publish rules, themselves properly arrived at, in compliance with 5 U.S.C.A. § 552(a)(1). In this respect we agree with the views of Judge Friendly speaking for the court in *United States* v. *Aarons*, 2 Cir., 1962, 310 F.2d 341, 347-48, that such rules are valid as against one with actual notice of them. See 1 Davis, Administrative Law § 6.10 (1958).

[2] Thirty days is the period which must elapse between publication and effective date of a rule promulgated in accordance with APA procedures. 5 U.S.C.A. § 553(d).

rulemaking procedures. This is a necessary and inevitable consequence of adjudication. Normally the Board must decide cases between party and party, as the Commission did in *Chenery*. The result, if stare decisis is to mean anything, is that any principle, once decided, stands as a guide for the future and may be spoken of as a rule. Examples are legion. Sometimes, until the Board spoke, all parties may have thought the "rule" was the other way. This may be unfortunate, but it is normally unavoidable, as *Chenery* demonstrates.

In *Excelsior*, however, the Board did not decide a case between party and party, or, more exactly, it decided a case one way, and took occasion to lay down a future rule the other way. *Chenery* in no fashion suggests approval of this. On the contrary, to the extent the Board was not deciding a case, this is precisely where Congress had instructed it as to the procedure it should adopt. The Board has chosen to disregard Congress.

Although the first time in this circuit, this is neither the first nor the most severe instance of Board action approximating contravention of the APA in this manner. It has been long and severely critized, *e.g.*, Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 72 (1961); 1 Davis, Administrative Law § 6.13 (Supp. 1967), with no apparent effect. We regret that the matter comes before us in connection with a rule to which we see little or no objection and for which there is much to be said. Yet, to blink at this procedure in this instance because we may approve of the result, we believe would be neither honest nor wise.[3] Congress provided no exception in the APA for rules improperly promulgated, but which some court, in a case between the agency and some individual, was persuaded

[3] We are not unmindful that two circuits have supported the *Excelsior* rule. *NLRB* v. *Rohlen*, 7 Cir., 1967, 385 F.2d 52; *NLRB* v. *Hanes Corp.*, 4 Cir., 1967, 384 F.2d 188, *cert. denied* 390 U.S. 950. However, so far as appears, the Board's failure to comply with the APA was not brought to the courts' attention. The courts were concerned with whether the substance of the rule was within the Board's rule-making power, not whether it was properly adopted.

were sound. To recognize such an exception would be to emasculate the statute.

We read Judge Coffin's dissent as disagreeing on this matter only in that he believes the rule promulgated to be "procedural" within the APA definition and therefore not subject to the requirement that advance notice of the intended rulemaking, and the substance of the rule, be given and that interested parties be afforded an opportunity to comment. 5 U.S.C.A. § 553. If the rule related simply to the mechanics of conducting an election, to superintending or checking the voters, we would agree. The *Excelsior* opinion makes the suggestion that this is one of the purposes. 156 N.L.R.B., *supra*, at 1242-43. However, the Board's decision effectively contradicts its own declaration. The Board already had a valid rule requiring the employer to furnish a checklist. The additional requirement of the *Excelsior* rule is expressly stated not to apply when the time interval is "too brief . . . for the union to be able to make any meaningful use of this information." *Id* at 1242, fn. 14. We can only conclude that *Excelsior's* purpose is what it appears to be on its face, a provision requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns.

Such assistance is substance, not Board procedure. It differs only in degree and not in kind from a requirement, for example, that an employer having an assembly hall or a printing press should make it available to groups requesting it. The Board's contentions that furnishing a mailing list is not expensive or seriously burdensome, or is required only because the union has no effective substitute, may well be justifications for the rule, but they do not change its character. Judge Coffin's emphasis on the relative lack of burden, and comparing the compilation of the list with affording space on a bulletin board, suggests factual determinations in each case that seem to us unnecessary at best. His desire to resolve questions of doubt in favor of a procedural label loses importance to us when one considers that its only purpose is to avoid affording interested parties an opportunity to present their views as to what is, quite apparently, a controversial rule.

It is also true that compliance with the rule may well increase the fairness of the election. This, however, is a conclusory argument. Many actions by the employer may add to the fairness of the election. This does not mean that ordering them to be done is procedural. We are particularly unmoved by our brother Coffin's suggestion that the fact the rule sets up a positive as distinguished from a negative requirement is indicative that it is not substantive.

The judgment of the district court is set aside and the court is ordered to dismiss the complaint.

COFFIN, *Circuit Judge* (dissenting). For the purpose of deciding the applicability of the notice provision of the Administrative Procedure Act, 5 U.S.C.A. § 1003(a), I view the *Excelsior* rule as procedural and thus valid despite absence of advance notice. I recognize that this is a ground not relied on by the Board, which seemed to assert a standard defense to a standard assault. But the same shoe fits both parties, for the distinction which divides this court was obviously far from the concern of appellant, which said in its brief, ". . . it is clear the Board recognized that it was establishing a new rule or procedure in the conduct of election proceedings under Section 9 of the Act."

The legislative history suggests to me that in grey areas doubt about the nature of a rule should be resolved in favor of applying the procedural label. In the first place, the few attempts to define terms equate substantive rules with "rules issued pursuant to statutory authority to implement statutory policy, as by fixing rates or defining standards", Attorney General's Manual on the A.P.A. (1947) 13 n. 5, or with rules "other than organizational or procedural . . . which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to . . . 15 U.S.C. 78n." Manual, *supra* at 30. I read the language and these examples as giving restrictive rather than expansive meanings to "substantive rule".

In addition, the Senate Committee on the Judiciary made clear that in exempting procedural rules from the notice requirement it was seeking to encourage such rules because "those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned." Legis. Hist. of the A.P.A. (1946), 18, 313.

The *Excelsior* rule itself seems to me to be clearly on the procedural side. It sets up a positive requirement of furnishing addresses as well as names of employees, to be applicable in every election. In this respect it differs from the proscription of selectively directed acts of coercion which are more appropriately accomplished through the unfair labor practice procedures.

That the requirement looks toward action the effect of which reaches beyond relations between a party and the Board ought not to be a controlling consideration, any more than it is with reference to the requirement in 29 C.F.R. § 101.19 (the Board's "Statements of Procedure" governing elections) that elections "be adequately publicized by the posting of official notices in the establishment. . . ." Indeed, the natural home of the *Excelsior* rule would seem to be in § 101.19.[1]

It is also, I think, a factor of relevance to the substance vs. procedure issue that the burden on the employer's time, efforts, or property in being compelled to furnish addresses of employees is inconsequential. I do not share the court's conclusion that this requirement "differs only in degree and not in kind" from one that would force an employer to make an assembly hall available on request. I would say that we are dealing with a dichotomy where difference in degree can result in a difference of kind or

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[1] All of this only refers to the primary objective of *Excelsior* to achieve better elections. The fact that a secondary purpose, the expeditious handling of challenges of voter eligibility, is inadvertedly procedural is an added factor of some significance. While a procedural secondary rule could not save a rule otherwise clearly substantive, it would seem that a primary purpose of ambiguous effect might be aided, insofar as notice is concerned, by such a secondary purpose.

difference in categorization. This, I think, is illustrated by the above noted procedural requirement that notices of election be posted "in the establishment"—in itself a minimal encroachment on the employer's domain.

While it may be that forcing employers to share with unions their previous monopoly on knowledge of addresses may have a net result of strengthening union power generally, such a result cannot be said to alter substantive "rights" unless the employer's prior easy access to addresses rises to the dignity of a right. *Cf. Sibbach* v. *Wilson*, 312 U.S. 1, 14 (1941). Moreover, the *Excelsior* rule by its terms applies to "all parties"—which include employees hostile to a new union or seeking decertification of an old one. *Cf. Wallace Murray Co.*, 1968-1 CCH NLRB Dec. ¶ 22,256.

I would, for the above reasons, hold that the *Excelsior* rule was valid. But this would not have been an end to the case. There remains the difficult question—how, if at all, can *Excelsior* be properly enforced?[2] The district court ordered that the subpoena be honored. The Board's power lies in the statutory language granting "the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. . . ." 29 U.S.C.A. § 161(1).

The authorities which have upheld the subpoena power as available to procure an *Excelsior* list[3] have defined the proceedings leading to representation certification as an investigation and have tortured the concept of "evidence" into something which is helpful in "facilitating a fully informed electorate". *NLRB* v. *Rohlen*, *supra* at 57. A

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[2] While what follows goes beyond the issue which divides the court, the writer feels obliged to explore the problem of enforcement which has led to conflicting and often strained statutory interpretation.

[3] *NLRB* v. *Rohlen*, 385 F.2d 52 (7th Cir. 1967); *N.L.R.B.* v. *Hanes Corp.*, 384 F.2d 188 (4th Cir. 1968), *cert. denied* March 4, 1968; *NLRB* v. *British Auto Parts*, 266 F. Supp. 368 (C.D. Cal. 1967); *Swift* v. *Solien*, 56 CCH Lab. Cas. ¶ 12140 (E.D. Mo. 1967); *NLRB* v. *Teledyne, Inc.*, 56 CCH Lab. Cas. ¶ 12229 (N.D. Cal. 1967); *NLRB* v. *Beech-Nut, Inc.*, 56 CCH Lab. Cas. ¶ 12237 (S.D. N.Y. 1967).

scrutiny of 29 U.S.C.A. § 161 yields the impression that "evidence" is used throughout in its more traditional sense as data relevant to the proof of a fact in issue.[4] I am sympathetic with the courts which have not been willing to make this leap. *NLRB* v. *Q-T Shoe Co.*, Civil No. 140-67 (D. N.J., filed Jan. 19, 1968); *NLRB* v. *Montgomery Ward, Inc.*, 54 CCH Lab. Cas. ¶ 11659 (M.D. Fla. 1967).

A second solution, suggested by *Q-T Shoe Co., supra*, is that the only way to enforce the *Excelsior* rule is first to secure a determination that refusal by an employer to provide a list of names and addresses of employees constitutes an unfair labor practice under 29 U.S.C.A. § 158 (a) (1), and then to seek the aid of the court under 29 U.S.C.A. § 160(e). This would seem plausible until the statutory definitions of unfair labor practices are examined. The Board in *Excelsior* wisely refrained from saying whether refusal to disclose names and addresses of employees would constitute "interference, restraint, or coercion" within the meaning of 29 U.S.C.A. § 158(a) (1). I would say that it is at least doubtful that any one of the effective verbs would cover such a case. "Interfere" is the most adaptable, but its entire thrust is aggressive, not passive. According to Webster's International Dictionary (3d int. ed. 1961), it means such things as "intervene", "intermeddle", and "interpose".

It cannot be said with assurance that a refusal to respond to the *Excelsior* rule—unless, perhaps, a repeated refusal—would predictably be denominated an unfair

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[4] A similar approach would be to define more narrowly the particular "investigation" as the quest for the names and addresses of the employees. With this frame of reference, the list of such names and addresses could be considered more traditionally as "evidence" relevant to the proof of the object of the investigation. Indeed the subpoena served on appellant contemplated a hearing before the Regional Director at which appellant's president was to testify from corporate books and records concerning the names and addresses of employees. In lieu of such books, a list would be received but only after Board agents had "verified its contents by examination of the subpoenaed books and records". In short, the list is arguably evidence tending to establish the true names and addresses being sought. The difficulty with this approach is that it tortures the word "investigation" into something quite different from its use in 29 U.S.C.A. § 159.

labor practice.[5] Moreover, constant litigation would ensue over the issue whether, in a given case, the refusal to provide a list had any effect at all on the representation proceeding. For example, in the case at bar appellant moved to quash the subpoena, citing as one ground that the unions already had employee mailing lists.

This leads to the remaining mode of enforcing the rule, if indeed there is any way at all. This is the injunction. The Congress has indicated by statute that the Board has authority to prescribe "regulations and rules of decision" governing consent elections. 29 U.S.C.A. § 159(c)(4). The Supreme Court has made it clear that "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly . . . [are] matters which Congress entrusted to the Board alone." *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940).

While there is a step between statute and rule, not present in *United States* v. *Feaster*, 330 F.2d 671 (5th Cir. 1964), I see no difference in principle. If, in *Feaster*, the statutory right to have access to books and records supported an injunction compelling access to names, addresses, and job classifications of employees, so here a rule predicated on statutory authority to regulate elections and carrying out Congressional policy should support the same remedy. Or, to go back to the observation in *Walling* v. *Brooklyn Braid Co.*, 152 F.2d 938, 941 (2d Cir. 1945), we should "consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted."

Assuming, therefore, the validity of the *Excelsior* rule, I see no other certain way in which it can be enforced than by injunction. And while the absence of other remedy is no adequate justification for judicial invention, I feel that enforcement of the rule lies well within the equity powers of the district court. I would therefore remand the case for consideration of the Board's alternative prayer for an injunction.

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[5] I would add that I would prefer some lesser sanction for enforcement of procedural rules than that stemming from an unfair labor practice proceeding.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7000

WYMAN-GORDON COMPANY ET AL., DEFENDANTS, APPELLANTS

v.

NATIONAL LABOR RELATIONS BOARD, PLAINTIFF, APPELLEE

JUDGMENT

June 12, 1968

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is set aside and the case is remanded with directions to dismiss the complaint.

By the Court:

(s) ROGER A. STINCHFIELD,
Clerk.

SUPREME COURT OF THE UNITED STATES

No. 463, October Term, 1968

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WYMAN-GORDON COMPANY

ORDER ALLOWING CERTIORARI.—Filed November 12, 1968

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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